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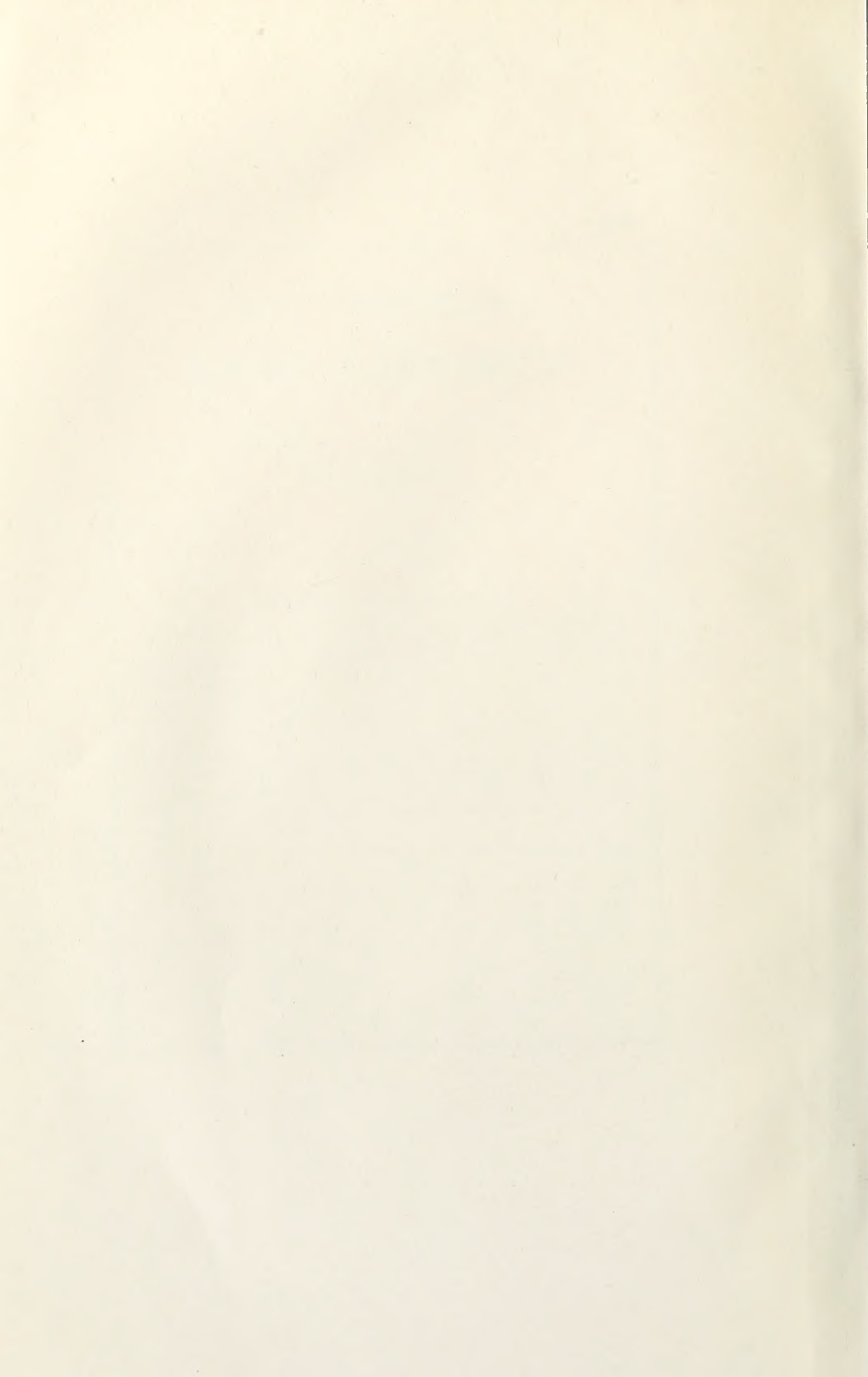
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046
No. 2833

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

COLUMBIA AND NEHALEM RIVER
RAILROAD COMPANY, a Corporation,
and A. S. KERRY,

Appellants,

vs.

ELBERT G. CHANDLER and NORTH-
WESTERN EQUIPMENT COM-
PANY, a Corporation,

Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United
States for the District of Oregon.

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*United States Circuit Court of Appeals
For the Ninth Circuit*

COLUMBIA AND NEHALEM RIVER
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and A. S. KERRY,

Appellants,

vs.

ELBERT G. CHANDLER and NORTH-
WESTERN EQUIPMENT COM-
PANY, a Corporation,

Appellees.

Names and Addresses of the Attorneys of Record:

Veazie, McCourt and Veazie, and

J. C. Veazie,

Corbett Building, Portland, Ore.,

for Appellants,

W. R. Litzenberg,

Wilcox Building, Portland, Ore.,

for Appellees.

CITATION ON APPEAL.

United States of America,
District of Oregon,—ss.

To Elbert G. Chandler and Northwestern Equipment
Company, a corporation, plaintiffs,

Greeting:

Whereas, Columbia and Nehalem River Railroad, a corporation, and A. S. Kerry, defendants, have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 26th day of April, in the year of our Lord, one thousand, nine hundred and sixteen.

CHAS. E. WOLVERTON,

Judge.

I hereby accept service of the foregoing citation on behalf of Elbert G. Chandler and Northwestern Equipment Company, plaintiffs and appellees.

W. R. LITZENBERG,

Attorney for said Plaintiffs and Appellees.

Filed April 26, 1916.

G. H. MARSH, Clerk.

*In the District Court of the United States for the
District of Oregon.*

July Term 1915.

BE IT REMEMBERED, That on the 19th day of August, 1915, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to-wit:

BILL OF COMPLAINT.

*In the District Court of the United States for the
District of Oregon.*

Elbert G. Chandler and Northwestern Equipment Co.,
a corporation,

Plaintiffs,

vs.

Columbia & Nehalem River R. R. Co., a corporation,
and A. S. Kerry,

Defendants.

To the Judges of the District Court of the United States
for the District of Oregon:

Elbert G. Chandler, of Portland, Oregon, and the Northwestern Equipment Co., a corporation of the State of Oregon, having its principal office and place of business at Portland, Oregon, brings this their bill of complaint against the Columbia & Nehalem River R. R. Co., a corporation of Oregon, with an office at Kerry, Oregon, and A. S. Kerry, of Kerry, Oregon, all residents and citizens of the State of Oregon, and inhabitants of the District of Oregon, and for cause of suit plaintiffs allege as follows, to-wit:

I.

That heretofore and on or before the 25th day of February, 1915, Elbert G. Chandler, one of the plaintiffs herein, was the true, original and first inventor of certain new and useful improvements in logging trucks not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than two years prior to his application for patent therefor hereinafter recited, and not in public use or on sale in the United States for more than two years prior to his application for patent therefor, hereinafter recited; and that no application for a foreign patent for said invention was filed more than twelve months prior to the filing of the application for the hereinafter recited patent in this country.

II.

That the said Elbert G. Chandler, being as afore-said the inventor of said improvements, and being a citizen of the United States, made application to the proper department of the Government of the United States, to-wit, the Commissioner of Patents, for letters patent in accordance with the then existing acts of congress, and having complied in all respects with the conditions and requirements of said acts, on the 25th day of May, 1915, letters patent of the United States No. 1,140,875, signed, sealed and executed in due form of law for said invention or discovery, were issued and delivered to the said Elbert G. Chandler, whereby there was secured to him and to his heirs, legal representatives and assigns for the term of seventeen years from the 25th day of May, 1915, the full and exclusive right of making, using and vending said improvement to others to be used, which said letters patent are now of record in the patent office of the United States, and the original or a certified copy of which is ready here in court to be produced.

III.

That a description or specification of the aforesaid improvement was given in the schedule to the aforesaid letters patent, accompanied by said drawings referred to in such schedule and forming a part of said letters patent. The said letters patent and the said specifications thereto annexed, which, or an exemplified copy of which, plaintiff will produce as directed by this court, were duly recorded in the patent office.

IV.

That this plaintiff Elbert G. Chandler, is President and one of the Directors and principal Stockholders of plaintiff, the Northwestern Equipment Co., and through said Northwestern Equipment Co., he has been and is engaged in the manufacture and sale of Logging Trucks built according to the specification and claims of said letters patent; that said plaintiff Elbert G. Chandler is the exclusive owner of said letters patent and of the invention and improvement therein described, and claims and owns all rights secured by said letters patent since the date thereof and is entitled to be protected in the enjoyment of the same.

V.

Yet the said defendant, well knowing the premises and the rights secured to your orators, as aforesaid, but contriving to injure your orators, and to deprive them of the benefits and advantages which might and otherwise would accrue unto them from said invention after the issuing of the letters patent and after the vesting of the same in your orators, as aforesaid, and before the commencement of this suit, did, as your orators are informed and believe, without the license or allowance and against the will of your orators, and in violation of their rights and in infringement of the aforesaid letters patent within the District of Oregon and elsewhere in the United States unlawfully and wrongfully, and in defiance of the rights of your orators, make or have made for its use, logging trucks

made according to and employing and containing said invention, and that it now is in possession of and is using a large number of said logging trucks, all in defiance of the rights acquired by and secured to your orators, as aforesaid, and to their great and irreparable loss and injury, and by which they are and still are being deprived of great gain and profits which they might and otherwise would have obtained, and which have been received and enjoyed, and are being received and enjoyed by the said defendants by and through their aforesaid unlawful acts and doings.

VI.

And your orators further show unto Your Honors, that said defendant did, on or about the 5th day of February, 1915, order from your orators thirty (30) sets of logging trucks embodying the invention and improvements of your orator Elbert G. Chandler, at the price of Seven Hundred (700) Dollars per set; that said order was confirmed, in writing, by these plaintiffs on or about February 6, 1915; that thereafter and on about February 11th, 1915, and after these plaintiffs had ordered material for the construction of said trucks so ordered by said defendants, defendant A. S. Kerry came to Portland and informed your orators that the Seattle Car and Foundry Co. had made him a better price on the same kind of truck; that your orators informed Mr. Kerry at the time that said logging truck was his invention, and that no one else could build or use it without infringing his rights; that said defendant A. S. Kerry advised your orators that it was a

matter of money with him and that these plaintiffs could either take one-half the order at a price of Six Hundred Twenty-five (625) Dollars per set, or that he would place all of it elsewhere; that your orators were thus, not only forced to take one-half the order for its improved logging trucks, as originally placed, and for which materials had already been ordered, but were forced to take said one-half order at a greatly reduced price, and these plaintiffs reluctantly and under protest undertook to fill the half order at the reduced price.

VII.

And your orators further show unto Your Honors, on information and belief, that said defendants have purchased from others than your orators large quantities of logging trucks built according to the specification and claims of the letters patent hereinbefore referred to, and have made and realized large profits and advantages in so doing, but to what extent and how much your orators do not know and pray a discovery thereof. And your orators say that the use of said invention by said defendants and their determination to continue the same, and their unlawful acts as aforesaid, in disregard and defiance of the rights of your orators, have the effect to and do encourage and induce others to venture to infringe said patent in disregard of your orators' rights.

And your orators further show unto Your Honors, that they have caused notice to be given to said defendant of said infringement and of the rights of your

orators in the premises, and requested them to desist and refrain therefrom; but defendants have disregarded said notice and refused to desist from said infringements, and still continue to use and purchase for use, logging trucks which infringe said letters patent owned and controlled by these plaintiffs.

And forasmuch as your orators have no adequate relief except in this court, to the end that the defendants may be compelled to account for and to pay over the income and profits thus unlawfully derived from the violation of the rights of your orators as above, and be restrained from any further violation of said rights, your orators pray that Your Honors may grant a writ of injunction, restraining the defendants and each of them and their agents from any further construction, or sale or use in any manner of said patented invention or any part thereof, in violation of the rights of your orators as aforesaid, and that the logging trucks now in the use of the said defendants may be destroyed, or delivered up to your orators for that purpose. And also, that Your Honors, upon the entering of a decree for infringement, as above prayed for, may proceed to assess, or cause to be assessed under your direction, in addition to the profits to be accounted for by the defendants as aforesaid, the damages your orators have sustained by reason of such infringement, and that Your Honors may increase the actual damages so assessed to a sum equal to three times the amount of such assessment, under the circumstances of the wilful and unjust infringement by the said defendant as herein set forth.

And your orators also pray for a provisional or preliminary injunction, and for such other relief as the equity of the case may require, and as to Your Honors may seem meet.

ELBERT G. CHANDLER,
Northwestern Equipment Company,

By E. G. CHANDLER, Pres.,
Complainants.

W. R. LITZENBERG,
Solicitor for Complainants.

United States of America,
State of Oregon,
County of Multnomah,—ss.

On the 18th day of August, 1915, at Portland, in the County and State aforesaid, before me personally appeared Elbert G. Chandler, and solemnly affirmed that he has read the foregoing Bill and knows the contents thereof, and verifies this complaint for himself and his co-plaintiff, and that he knows that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true, and thereupon subscribed the same.

I. M. GRIFFIN,
Notary Public within and for the
County of Multnomah, State of Oregon.

(Seal)

Filed August 19, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 23rd day of October, 1915, there was duly filed in said Court and cause, an answer in words and figures as follows, to-wit:

ANSWER.

To the Honorable Judges of the District Court of the United States, for the District of Oregon:

Come now the Columbia and Nehalem River Railroad, a corporation, erroneously impleaded as the Columbia and Nehalem River Railroad Company, and A. S. Kerry, the above named defendants, and answering the Bill of Complaint herein admit, deny and allege as follows, to-wit:

I.

Said defendants deny that heretofore or on or about the 25th day of February, 1915, or at any time, the plaintiff Elbert G. Chandler was the true, original or first inventor of any new or useful improvement in logging trucks, or of any improvement in logging trucks not known or used by others in this country before his alleged invention or discovery thereof, or of any improvements in logging trucks not patented or described in any printed publication in this or any foreign country, before his alleged invention or discovery thereof, or more than two years prior to his application for patent therefor, or of any improvement of logging trucks not in public use or on sale in the United States for more than two years prior to his application for patent therefor; and these defendants are without knowledge whether any application for a foreign patent for said alleged

invention was filed more than twelve months prior to the application by the said plaintiff for his patent in the United States.

II.

These defendants deny that the said Elbert G. Chandler was the inventor of said or any improvements, but admit that he did make application to the Commissioner of Patents for letters patent on an alleged invention, and that patent therefor was issued to him, but these defendants deny that the said Elbert G. Chandler complied in all or any respect with the conditions or requirements of the acts of Congress relating to the issuance of patents, and deny that by the issuance of said letters patent there was secured to him or to his heirs or legal representatives or assigns, for any terms of years, the full or exclusive or any right of making or using said alleged improvement, or vending the same to others to be used.

III.

These defendants are without knowledge whether or not said plaintiff Elbert G. Chandler, is president or one of the directors, or one of the principal stockholders of plaintiff, the Northwestern Equipment Company, and are without knowledge whether or not through said Northwestern Equipment Company said plaintiff has engaged in the manufacture or sale of logging trucks built according to the specification and claims of said letters patent, except that these defendants admit that said Northwestern Equipment Company did sell to the

said Columbia and Nehalem River Railroad certain logging trucks having the outer draw-bar of standard height and the inner draw-bar below standard height. These defendants are without knowledge whether the said plaintiff Elbert G. Chandler is the exclusive owner of the said letters patent, but deny that he is the exclusive owner, or the owner at all, of any invention or improvement therein described. These defendants deny that any rights are secured by said letters patent and deny that the said Elbert G. Chandler is entitled to be protected in the enjoyment of any rights under said letters patent.

IV.

These defendants admit that the defendant Columbia and Nehalem River Railroad has ordered from the plaintiff, Northwestern Equipment Company, certain logging trucks having the outer draw-bar of standard height and the inner draw-bar below standard height, and has ordered and procured from the Seattle Car and Foundry Company, a corporation of the State of Washington, having its principal place of business in Seattle, in said State, twenty sets of the said trucks, and that the defendant Columbia and Nehalem River Railroad has used the said logging trucks in its logging operations, but defendants deny that they at any time knew, or that they now know, that the plaintiff Elbert G. Chandler was the inventor of any improvement employed or contained in such logging trucks, or any of them, and deny that they knew at the time the said logging trucks were so ordered and procured that the said Elbert G. Chandler claimed to be the inventor of any improvement em-

bodied or contained in said logging trucks, or that he had made application for or received United States patent for any such alleged invention or improvement, and deny that the defendants or either of them, at any time contrived or intended to injure plaintiffs, or either of them, or to deprive the plaintiffs, or either of them, of any benefits or advantages which might otherwise accrue to them, or either of them, from any invention either before or after the issuance of the said letters patent; and these defendants deny that they have at any time infringed or violated any rights of the plaintiffs, or either of them, or that the defendants or either of them have acted wrongfully or unlawfully or in defiance of any rights of the plaintiffs, or either of them, in causing to be made or in using the said logging trucks, and these defendants deny that any loss or injury has been occasioned to plaintiffs, or either of them, by these defendants, and deny that the plaintiffs, or either of them, have at any time been or are being deprived of any gains or profits which they might or would have obtained, and deny that these defendants have received or enjoyed, or are receiving or enjoying any profits or gains to which the plaintiffs, or either of them, are or at any time have been entitled.

V.

These defendants deny that they, or either of them, did on or about the 5th day of February, 1915, or at any time order from the plaintiffs thirty sets of logging trucks embodying any invention or improvement of the said Elbert G. Chandler, and deny that any such

order was confirmed in writing or otherwise by the plaintiffs, and deny that said Chandler informed A. S. Kerry that said logging truck was his invention, but admit that the defendant Columbia and Nehalem River Railroad did order from the Seattle Car and Foundry Company twenty sets of logging trucks having their outer draw-bars of standard height and their inner draw-bars below standard height, and that said defendants did order from the said plaintiff, the Northwestern Equipment Company, fifteen sets of such logging trucks, and that it was understood and agreed by and between said defendant and the plaintiff Northwestern Equipment Company that said trucks should be furnished, and they were furnished, at the price of \$625.00 per set, and that said defendants required the said plaintiff to furnish the said logging trucks at the same price at which the Seattle Car and Foundry Company had offered to furnish the same; but these defendants deny that the plaintiffs were forced to take, accept or fill the said order, and deny that the plaintiffs had ordered materials for any greater number of logging trucks than said defendants actually took.

VI.

That defendants deny that they have purchased any logging trucks built according to the specifications or claims of the said letters patent, except that they admit the defendant Columbia and Nehalem River Railroad has purchased from the Seattle Car and Foundry Company and from the plaintiff Northwestern Equipment Company, the logging trucks hereinabove described;

and defendants deny that they have made or realized large or any profits or advantages in so doing, and deny that they have used any invention of the plaintiffs, or either of them, and deny that they intend to use any invention of the plaintiffs, or either of them, and deny that the defendants, or either of them, have committed any unlawful acts or have disregarded or defied any rights of the plaintiffs, or either of them, and deny that the defendants, or either of them, have infringed or have encouraged or induced any one else to infringe any rights of the plaintiffs, or either of them; and these defendants admit that the plaintiffs have notified the defendants that they, the plaintiffs, claim the exclusive right to construct and sell logging trucks having the outer draw-bars higher than the inner draw-bar, and that the defendant the Columbia and Nehalem River Railroad has refused to desist from using the said logging trucks so purchased by it from the Seattle Car and Foundry Company; but defendants deny that they, or either of them, have infringed any right of the plaintiffs, or either of them, and deny that the defendants or either of them have used or purchased or continue to use or purchase for use, any logging trucks which infringe any rights of the plaintiffs, or either of them.

For a first further and separate answer and defense to said Bill of Complaint, these defendants allege that the said Elbert G. Chandler was not the original or first inventor or discoverer of any part of the alleged invention or improvement described in the said patent claimed by him, but that during or prior to the month of November, 1914, and long prior to the alleged in-

vention of the said improvement by the said Elbert G. Chandler the defendant A. S. Kerry did inform the said Elbert G. Chandler and the Northwestern Equipment Company, as well as the Seattle Car and Foundry Company, that he desired to have built for use upon the logging railway of the defendant Columbia and Nehalem River Railroad, logging trucks having the draw-bar or coupling apparatus at the outer end of standard height, so as to couple with standard equipment, and the draw-bar or coupling apparatus at the inner end below standard height so that said inner draw-bar and coupling apparatus would not interfere with long logs which might sag in the course of transportation, and that said alleged improvement which is embodied in said patent of Elbert G. Chandler was and is simply the idea so suggested by the said A. S. Kerry to the said Elbert G. Chandler, and that the said Elbert G. Chandler has surreptitiously, wrongfully and unlawfully endeavored to appropriate to himself and obtain exclusive use and benefit of said suggestion and idea so communicated to him.

For a second further and separate answer and defense to said Bill of Complaint, defendants allege:

That the so-called invention or improvement described and embodied in the said letters patent does not involve or contain any patentable novelty, invention or discovery, nor cover or disclose any new art, machine, manufacture or composition of matter, nor any new or useful improvement thereof, and that the said alleged invention involves and comprehends only an obvious,

well known and purely mechanical expedient or adjustment of familiar devices and appliances.

For a third further and separate answer and defense to said Bill of Complaint, defendants allege:

That neither the alleged improvement which the patent mentioned in the Bill of Complaint purports to cover, nor any element or feature thereof, was invented or discovered by the said Elbert G. Chandler, but that the said improvement and all essential parts and features thereof were in common use by numerous persons and well known to the public generally for many years prior to the application for said patent by the said Elbert G. Chandler, and for many years prior to his alleged invention of said improvement. That at all times since trucks, cars, car trucks and logging trucks have been in use and for much more than two years prior to the application of the said Elbert G. Chandler for the said patent it was found necessary for persons making or using such trucks, cars, car trucks and logging trucks to make, and it was common for them to make, the bodies and main frame works thereof in a great variety of forms and of many heights, so as to meet the needs of various kinds of traffic to be handled, and it was necessary for them to adapt and arrange, and they have adapted and arranged the draw-heads, coupling devices and parts connecting such trucks, cars, car trucks and logging trucks with one another and with locomotives and other apparatus, as well as those connecting together different sets of wheels under one truck or car, at various heights and in various ways as

might be deemed most convenient and desirable in view of the kinds of loads to be hauled, the mode of construction of other parts of the equipment and the height at which it might be necessary or desirable to couple with other equipment, and during all of said times it has been a common device and expedient for makers and users of trucks, cars, car trucks and logging trucks to raise or lower such draw-heads, coupling devices and connecting parts of the equipment in numerous ways and degrees and in such manner and to such extent as might be suggested or made necessary by the conditions to be dealt with. That such adjustments and devices have been numerous and it is not practicable for these defendants to specify all of them, but that the following are familiar examples and in all the following instances the equipment mentioned had been in open, public and familiar use for more than two years prior to the application of the said Chandler for the patent mentioned in the Bill of Complaint, to-wit:

In horse drawn trucks in common use in the City of Portland, Oregon, by the Oregon Transfer Company, and other persons, trucks having their tongues and draught apparatus at the usual height of wagon tongues, and their bodies and parts connecting their two sets of wheels substantially lower.

In standard railroad equipment in common use in said City of Portland and many other places, by the Northern Pacific Railroad, and other roads entering the City of Portland, locomotive tenders having the draw-heads by which they couple to the locomotives substantially higher than the draw-heads by which they

couple to the railway cars; also railway cars, both passenger and freight, having their draw-heads and coupling devices of uniform and standard height, but having their floors, platforms and bodies of varying heights, so that there are numerous differences of adjustment in the relative heights of the draw-bars and the floors, bodies and platforms; also freight cars having their ends of such height as to extend above draw-heads of standard height but having the connecting and supporting parts of the bodies between the two sets of trucks substantially lower than the ends and lower than the standard coupling.

In street car equipment in common use in the said City of Portland by the Portland Railway, Light and Power Company, several types of street cars having their platforms of different heights and their draw-heads and coupling devices likewise at different heights, both positively and relatively, to the heights of the platforms and bodies of the cars, and with bent or movable draw-bars, so as to accommodate the desired height of coupling to the height of the draw-heads of the cars; also car trucks with the wheels and frame work at the front end of the front truck and the rear end of the rear truck higher than the wheels and the frame work at the rear end of the front truck and the front end of the rear truck; also flat cars having their bodies and draught sills of the ordinary height of standard railway flat cars, but with bent draw-bars connecting with the draught sills at standard height and bent downward so as to couple with equipment below standard height.

In logging trucks, a certain logging truck built by the Seattle Car and Foundry Company in 1910, for the Marysville and Northern Railroad Company, and used on said railroad near Marysville, Washington, which car had draught timbers so placed that draw-heads could be attached thereto at either end, either at standard height or below standard height to suit the equipment to which said car was to be coupled; that the said car was thereafter returned to the Seattle Car and Foundry Company and the draw-head at the one end was placed at standard height and the draw-head at the other end was placed below standard height, so that the draw-head at standard height could be used for coupling to standard locomotives and the draw-head of lower height at the other end could be used for coupling to logging trucks below standard height, and for more than two years prior to the application of the said Elbert G. Chandler for said patent, said truck with draw-heads so adjusted was used by the Seattle Car and Foundry Company at its plant in Seattle, Washington, for hauling with a standard locomotive, logging trucks which had their draw-heads and coupling devices lower than standard.

In railway cars, certain cars built in April, 1910, by the Seattle Car and Foundry Company for the Marysville and Arlington R. R. Co., which cars had at each end extra draught timbers so constructed and arranged that the draw-heads could be attached thereto either at standard height or below standard height to suit the equipment to which they were to be coupled and

which were used for many years on the railroad of the said company in the State of Washington.

That it is, and was for many years prior to the alleged invention of the said defendant Elbert G. Chandler mentioned in the Bill of Complaint, common among builders and users of logging trucks to build such trucks of various heights so that some of such trucks were of the height of standard railroad equipment and had draw-bars at the height of the coupling appliances of standard railroad equipment, while other such trucks were lower than standard railroad equipment and had draw-heads at a height corresponding to the heights of their bodies and lower than the draw-heads of standard railroad equipment, the height of both the trucks and draw-heads being governed by the demands of the traffic and the requirements of the particular purchaser or user; and it was and is common to provide for the coupling of logging locomotives and trucks of various heights, either by having several slots of various elevations in the draw-heads of the locomotives, or by using bent or movable bars or links with which to couple the locomotive to the truck nearest to it, the other trucks of the train connecting with one another at their common height; that long prior to the alleged invention of the defendant Elbert G. Chandler, loggers who hauled logs of great length discovered that such logs were likely to sag and thus interfere with the inner ends of the trucks and the draw-heads thereon unless the trucks were so constructed as to afford greater clearance between the tops of the bunks supporting the logs and such inner draw-heads than is necessary in trucks con-

structed for hauling short logs, but that said difficulty was easily overcome by the use of low trucks with low draw-heads and bunks of sufficient height to afford the desired clearance; and not less than six years prior to the application of the said Elbert G. Chandler for the patent alleged in the Bill of Complaint, the Benson Logging Company hauled very long logs successfully on its logging railway near Clatskanie, Oregon, by using ordinary low logging trucks with high bunks and coupled to its standard locomotive trains made up of such trucks, by means of bent or movable draw-bars or links; that during all of said times it has been self-evident to makers and users of logging trucks and they have well known that if logging trucks built for coupling in trains at standard height and having low bunks were to be used for such hauling of unusually long logs, it would be necessary to provide the requisite clearance between the top of the bunk and the inner draw-bar either by raising the bunk or by lowering the inner draw-heads of each set of trucks, and in March, 1914, the Clark and Wilson Lumber Company of Linnton, Oregon, suggested to the Seattle Car and Foundry Company that it adapt its standard logging trucks to the hauling of long logs by so lowering the inner draw-heads, but the demand for trucks of such construction was not sufficient at that time to warrant their manufacture and such trucks were not manufactured by the Seattle Car and Foundry Company until after requests therefor were made by these defendants in 1914, as hereinabove alleged, but that after such requests were so made and prior to said alleged invention by the defend-

ant, Elbert G. Chandler, said Seattle Car and Foundry Company made the necessary plans and prepared to manufacture such trucks and that it has manufactured such trucks pursuant to and in accordance with such request by these defendants and in accordance with the obvious requirements of the business and not in pursuance of any invention by the said Elbert G. Chandler, nor upon any suggestion of the said Elbert G. Chandler.

For a fourth further and separate answer and defense to said Bill of Complaint, these defendants allege:

That all of the essential features, principles and elements of the alleged improvement or discovery of the said Elbert G. Chandler were disclosed and described prior to the alleged discovery or invention of the said Elbert G. Chandler and more than two years prior to his application for said patent in United States Patent No. 1032348, issued July 9, 1912, to J. W. Bettendorf, of Bettendorf, Iowa, administrator of the estate of W. P. Bettendorf, deceased, the residence of said patentee being Bettendorf, Iowa; and in United States Patent No. 1008921, issued November 14, 1911, to Gustav Komarek, of St. Louis, Missouri, whose residence is St. Louis, Missouri, and by the specifications and drawings of the said Bettendorf and Komarek patents.

WHEREFORE, these defendants pray that the Bill of Complaint be dismissed, and that they have judgment against the plaintiffs, and each of them, for their costs and disbursements herein.

VEAZIE, McCOURT & VEAZIE,
J. C. VEAZIE,

Attorneys for Defendants.

To W. R. Litzenberg, Esq.,
Attorney for Plaintiffs:

Please take notice that at the trial of the above entitled cause, defendants will offer evidence in support of all the foregoing defenses, matters and things.

VEAZIE, McCOURT & VEAZIE,
Attorneys for Defendants.

Filed October 28, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 20th day of December, 1915, there was duly filed in said Court and cause, a supplemental answer in words and figures as follows, to-wit:

SUPPLEMENTAL ANSWER.

Come now the defendants, and, by leave of Court first had, file this their supplemental answer and as an amendment of and addition to the third further and separate answer and defense set up in the answer of the defendants herein filed, alleged as follows, to-wit:

That in May, 1910, the Hammond Lumber Company, a corporation engaged in the logging and lumbering business in Clatsop County, Oregon, ordered from the Seattle Car Manufacturing Company, of Seattle, Washington, which was the predecessor in business of the Seattle Car and Foundry Company mentioned in the answer heretofore filed herein, a certain car to be used in logging operations and so constructed that the

said car should have at one end a draw-head and standard M. C. B. tower coupler at the height of the coupling devices of the Russell logging trucks, to-wit, twenty-six (26) inches from the top of the rail to the center of the coupler, such draw-head and coupling device to be used for coupling the said car to logging trucks at the height of twenty-six (26) inches, and having at the other end a draw-head and standard M. C. B. tower coupler at the standard height of railroad coupling devices, to-wit, thirty-two (32) inches from the top of rail to the center of coupler, said car to be used for the purpose of coupling the same at one end at standard height to locomotives, or other equipment having couplers of standard height, and at the other end to logging trucks having their couplers below standard height; and that pursuant to the said order the said Seattle Car Manufacturing Company did, in or about the month of May, 1910, manufacture and deliver to the said Hammond Lumber Company a car constructed in accordance with the said order and having its draw-heads and coupling devices at different heights, as above set forth.

VEAZIE, McCOURT & VEAZIE,
J. C. VEAZIE,

Attorneys for Defendants.

Filed December 20, 1915.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Friday, the 24th day of March, 1916, the same being the 16th Judicial day

of the regular March, 1916, term of said Court; Present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

FINAL DECREE.

*In the District Court of the United States for the
District of Oregon.*

Elbert G. Chandler and Northwestern Equipment
Company,

vs.

Columbia and Nehalem River Railroad, a corporation,
and A. S. Kerry.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed, as follows, viz.:

That United States Patent Number 1,140,875, issued to Elbert G. Chandler, May 25, 1915, for Logging Truck is for patentable subject matter and is valid;

That said patent is infringed by the logging trucks purchased by defendants in this case from the Seattle Car and Foundry Company, and now being used by said defendants;

That said defendants, and each of them, their agents and representatives, are hereby enjoined from any further construction, or sale, or use in any manner of said patented invention in logging trucks, including the fur-

ther use of the 20 sets so purchased from said Seattle Car and Foundry Company;

That damages in the amount of \$660.00 for plaintiff together with costs of the proceeding, be and are hereby allowed complainants.

CHAS. E. WOLVERTON,
District Judge.

Filed March 24, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 24th day of March, 1916, there was duly filed in said Court and cause, an opinion in words and figures as follows, to-wit:

OPINION.

William R. Litzenberg, for Plaintiffs; Veazie, McCourt & Veazie, for Defendants; Wolverton, District Judge.

This case involves the validity, in the first place of a patent which was issued to Chandler, being numbered 1,140,875. The application was filed February 21, 1915, and the patent was issued May 25, 1915. The principal question that is presented in the case is whether the device in question was subject to patent. It is claimed on the one side that the discovery was not a matter of inventive faculty, and that it only comprised making a change, in order to effect the device desired, that only required the application of mechanical skill or judgment and choice.

We will first ascertain what is meant by the application of mechanical skill or of judgment and choice. That may be done better by illustration than in any other way.

If an ordinary mechanic is called upon to make a change for adaptation to some specific purpose, and if in the course of the application of his mind to his work the change is readily suggested, and would be suggested to any ordinary mechanic, or skilled mechanic even, then it would simply be the application of mechanical skill. You may take a rope, for instance, as an illustration, and it is desired to splice the rope. Any ordinary person of mechanical skill would say at once that the rope might be spliced by simply tying the ends of the rope together, and the splicing would be accomplished. Or you may take the illustration that was suggested this morning in the argument—the placing of weather-strips about a door or a window, to keep out the air or the wind. It does not require any inventive faculty to do that, because it would be suggested to the mind of a mechanic or a person skilled in his work that that would be a simple way of doing it, and it would be accomplished simply by applying the strips. And the same is true of the case involving the affixing of rubber flaps about an elevator to keep the warm air from getting into a cool room; and of the several illustrations that were given this morning. You may take the dredging enterprise, for instance, where the propeller was first affixed to the rear of the boat. It was ascertained that the working of the propeller would stir up the mud or debris from beneath, and that would be carried away by the stream.

The mere placing of the propeller in the front end of the boat instead of the rear was not an application of inventive faculty. It is a matter that would be suggested to the ordinary mechanic, or the person desirous of making a change in that way, to suit convenience. That would be the mere application of mechanical skill, or judgment and choice. Inventive faculty requires something in addition to this, something that would evolve from the mind, something new that would be useful when applied, and something that would not be suggested by the ordinary mechanic in the adaptation of his vocation.

Now, in the present instance, the question came up as to what would be necessary to obviate a difficulty that was found present. The industry of hauling logs of considerable length, it seems, has sprung up recently; that it is more in accordance with the desires of the parties in the industry to haul the logs of considerable length than to haul them in shorter lengths, as heretofore. When the parties entered upon the work, they found that a long log placed upon two trucks, where the trucks were far apart, would sag in the center, by reason of the weight of the logs themselves, and this sagging, it was found, brought the log down into contact with the draw-bar, the draw-bars being of the regulation height; or, if both draw-bars were of the same height, whether of the regulation height or not, it would have the same effect. And so the question came up how to obviate that difficulty. The condition was present that it was desirable to have a truck with a draw-bar of the standard height, so that the truck could be used in con-

nection with the ordinary flat-car, or any other car that is used in ordinary transportation, with the standard height of draw-bar; and that was another difficulty in the way.

Three ways were suggested of obviating the difficulty of the logs by sagging coming in contact with the draw-bar. One way was by raising the bunk. But it was found, I suppose in the course of reasoning, that raising the bunk would bring the center of gravity so high that it would interfere with the operation of the car, and might cause its derailment. Another suggestion arose as to whether the difficulty would not be obviated by shortening the bunk. That, it was said, would do it; yet, at the same time, there were some objections to a short bunk. Then came the suggestion that the lowering of the draw-bar at one end of the truck would solve the difficulty. But in order to obviate the difficulty by lowering the draw-bar at one end, it was found to be necessary to use two trucks in conjunction, one with the other. The draw-bar at one end of one truck being lowered, and the draw-bar at the other end of another truck, these two lowered draw-bars would act with each other; and on the opposite ends of the two trucks, the outer ends, would be the standard draw-bar, to be used with the standard flat-car or standard coach, etc.

So that it may be seen, from taking into consideration the difficulties presented, and all of them, that it required more than ordinary mechanical skill to work out the problem. Hence the idea was hit upon to lower

the draw-bar at one end of each truck, and that these draw-bars would co-operate, and the outer ends of the trucks as thus combined, having the standard draw-bar, would co-operate with the ordinary flat-car.

Now, the invention involved the reduction, after a consideration of all these ideas, to practical use, and that is exactly what Mr. Chandler has done in this case. He has lowered the draw-bar on one end of each truck and made two trucks co-operate together, and the draw-bars being thus lowered has completely obviated the difficulty presented.

I think, taking into consideration the whole of this, that that comprised inventive faculty; that it took something more than the ordinary skill of a workman to work out this design, and to so complete it that it would be useful and practical. And I am of the opinion that the patent issued was upon a patentable design, and therefore that the patent is valid, unless it has been anticipated by a prior patent.

Now, there have been three patents introduced here which were prior to this, and it is claimed that each of these patents has anticipated the patent in question. The first one, however, is not much relied upon in argument. The other two are considerably relied upon, but, without undertaking to analyze these patents, I am of the opinion that they do not anticipate the patent in question. They do not involve the use of two trucks and the lowering of a draw-bar at one end of each truck, so as to make the two trucks co-operate when not used for the actual hauling of the logs. They involve other

apparatus and other devices entirely, not involving the device in question or the improvement in question; and hence I think there was no anticipation.

The question has been argued here as to who first suggested this change in the apparatus which finally brought about the issuance of the patent. There is some question in the testimony as to whether the idea was first suggested by Mr. Chandler, or whether by Mr. Withrow. Mr. Withrow claims that he made the suggestion in the first place. Mr. Chandler thinks that he was the first one to suggest it, or that the idea came to him first. Mr. Chandler is corroborated by the testimony of Mr. Van Cleve very pointedly. But, taking into consideration the testimony that Mr. Chandler entered at once upon the completion of his design, so as to put it into proper arrangement for use, and that Mr. Withrow allowed the matter to rest and made no effort toward a completed design for useful purpose, and taking into consideration also the other testimony in the case, that, after Mr. Chandler had perfected his design, constructed a car, and supplied one of those cars to the defendant company, then the Seattle Company, seeing that design, offered to make a car of the same design and to sell it to the defendant company, I think the question resolves itself very satisfactorily in favor of Mr. Chandler's being the originator of the idea, to say nothing of the matter of reducing it to practice.

That leaves only one other question, which is touching the damages in this case. I have some doubt as to how to resolve that question. The measure of damages

seems to be the amount of loss a person has sustained by the use of his design by another person.

“Plaintiff is entitled to a verdict only for the actual damages sustained by him because of and during the time of the infringement for which the suit was brought, and not to exemplary damages. Damages are to be measured by the actual loss to plaintiff, which must be shown. It may be shown by any means which will best establish the loss.” 30 Cyc. 1020.

“The verdict at law must be for the actual damages, but the court may in its discretion enter judgment thereon for any sum above the verdict not exceeding three times the amount of the verdict. Damages may be increased to recompense plaintiff, where the circumstances of the infringement are aggravated and the litigation expensive.” 30 Cyc. 1023.

“In equity the complainant may recover the amount of the gains and profits that defendant has made from the use of the invention, and in addition may have the damages sustained by him assessed.” 30 Cyc. 1024.

Now, in this case, while plaintiff had practically completed a contract with the defendant company for the sale of 40 sets of these trucks, at a price of \$700 each, yet before the contract was entered upon in the way of furnishing the trucks, or even in the way of building them, Mr. Kerry called up Chandler to talk with him, and not getting him on the 'phone, he left word, and the next day came to see Chandler in Portland. The matter was then talked over, and finally an adjustment came about whereby Chandler was to furnish 20

sets of the trucks and allow the Seattle Company to furnish 20.

Chandler has testified that it cost him to build those truck and to furnish then \$614, leaving a profit really of \$11 on each set of trucks. I am disinclined to allow the difference between the contract price first made, that is \$700, and the amount which he finally received for the trucks as the correct measure of damages in this case. The damages must be proven by the plaintiff, as indicated by this authority, or he cannot recover. He has shown, however, that he has lost \$11 on each of the 20 sets of trucks that were furnished by the Seattle Company. That would make a total of \$220, and, under the conditions that here prevail, I think that the court ought to allow a trebling of that amount, in the discretion of the court. I read again from 30 Cyc. 1023:

“The verdict at law must be for the actual damages, but the court may in its discretion enter judgment thereon for any sum above the verdict not exceeding three times the amount of the verdict.”

In this case I think the facts warrant and justify the court in assessing three times the amount of the actual damages which the plaintiff seems to have sustained. That will be \$660 for the plaintiff. And of course the judgment will carry the costs of the proceeding in favor of the plaintiff.

The decree will be entered accordingly.

And afterwards, to-wit, on the 26th day of April, 1916, there was duly filed in said Court and cause, a petition for appeal, in words and figures as follows, to-wit:

PETITION FOR APPEAL.

The defendants herein, the Columbia and Nehalem River Railroad, a corporation, and A. S. Kerry, feeling themselves aggrieved by the decree made by said Court on the 24th day of March, 1916, whereby it was adjudged and decreed that United States Patent No. 1,140,875, issued to Elbert G. Chandler May 25, 1915, for logging trucks is for a patentable subject matter and is valid, and that said patent is infringed in the logging trucks purchased by the defendants in this cause from the Seattle Car and Foundry Company and now being used by said defendants, and that said defendants and each of them, their agents and representatives, be enjoined from any further construction or sale or use in any manner of said patented invention in logging trucks, including the further use of the twenty sets so purchased from said Seattle Car and Foundry Company, and that damages in the amount of \$660.00 for plaintiffs, together with the costs of the proceeding, be allowed complainants, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said decree and judgment, and each and every part thereof, and they pray that this their petition for such appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to

the said United States Circuit Court of Appeals for the Ninth Circuit.

And the defendants further pray that their bond upon appeal and for a supersedeas, which is in the sum of five thousand dollars (\$5000), with the National Surety Company of New York as surety, which is tendered herewith, be approved, and that all further proceedings upon said judgment and decree and that the said injunction be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth Circuit.

**VEAZIE, McCOURT & VEAZIE,
J. C. VEAZIE,**

Attorneys for said Defendants.

Filed April 26, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of April, 1916, there was duly filed in said Court and cause, an assignment of errors in words and figures as follows, to-wit:

ASSIGNMENT OF ERRORS.

Come now the defendants and file the following assignments of error, upon which they and each of them will rely upon their appeal from the decree made by this Honorable Court on the 24th day of March, 1916:

1. That the United States District Court for the District of Oregon erred in holding that the letters

patent of the United States, granted on May 25, 1915, to the plaintiff, Elbert G. Chandler, being patent No. 1,140,875, and being the letters patent sued on herein, are good and valid in law.

2. The said Court erred in holding that the pretended improvements claimed in and by the said patent or any of them were inventions when produced by the said Elbert G. Chandler.

3. The said Court erred in holding that any of the pretended improvements claimed in or covered by the said patent was possessed of patentable novelty or included, or involved, or showed any patentable novelty or invention.

4. The said Court erred in failing to find and hold that the pretended improvements embraced in and claimed under the said patent were anticipated by the several patents set forth in the answer of the defendants and offered in evidence at the trial of this cause.

5. The said Court erred in failing to find and hold that the said pretended improvements consisted wholly of ideas, expedients and adaptations which were well and commonly known and in general public use in numerous cars, or trucks and other devices for many years prior to the alleged invention represented by the said patent.

6. The said Court erred in holding that the said Elbert G. Chandler was the original and first inventor of the alleged improvements described in said patent.

7. The said Court erred in holding that said patent is infringed by the logging trucks purchased by the defendants from the Seattle Car and Foundry Company and which are being used by the defendants.

8. The Court erred in holding and decreeing that the defendants and each of them and their agents and representatives be enjoined from any further construction, sale or use in any manner of logging trucks having the draw-head at standard height and the other draw-head substantially below standard height, and in holding and decreeing that the defendants be enjoined from the further use of the twenty sets of logging trucks so purchased from the Seattle Car and Foundry Company.

9. The said Court erred in awarding plaintiffs damages in the amount of six hundred and sixty dollars (\$660) or in any sum or the costs of the proceeding.

10. The said Court erred in failing to decree that the complaint of the plaintiffs be dismissed and in failing to award defendants judgment for their costs and disbursements.

**VEAZIE, McCOURT & VEAZIE,
J. C. VEAZIE,**

Attorneys for Defendants.

Filed April 26, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 26th day of April, 1916, there was duly filed in said Court and cause, a bond on appeal, in words and figures as follows, to-wit:

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, the said Columbia and Nehalem River Railroad, a corporation organized under the laws of the State of Oregon, and having its principal office at Portland, Oregon, and A. S. Kerry, of Kerry, Oregon, as principals, and the National Surety Company, a corporation organized under the laws of New York, and having its principal office in the City of New York, as surety, are held and firmly bound unto the above named Elbert G. Chandler and Northwestern Equipment Company in the sum of five thousand dollars (\$5000) to be paid to the said Elbert G. Chandler and Northwestern Equipment Company, and for the payment of which well and truly to be made we bind ourselves and each of us, and our and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of April, 1916.

The condition of this obligation is such that WHEREAS the above named Columbia and Nehalem River Railroad and A. S. Kerry have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment for damages and costs and the decree for an injunction granted

in the above entitled suit, in the District Court of the United States for the District of Oregon, in equity, on the 24th day of March, 1916:

NOW THEREFORE THE CONDITION of this obligation is such that if the above named Columbia and Nehalem River Railroad and A. S. Kerry shall prosecute their said appeal to effect, and answer all damages and costs if they fail to make such appeal good, and shall pay all damages and profits which may result from any further construction, sale or use in any manner of the alleged patented invention described and referred to in the said decree, the construction, sale and use of which are by the said injunction enjoined from and after the date hereof until the final decision of the Circuit Court of Appeals herein, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

IN TESTIMONY WHEREOF, the said principals and surety have caused these presents to be executed by their duly authorized representatives this 24th day of April, 1916.

COLUMBIA AND NEHALEM RIVER RAILROAD

By J. C. VEAZIE,
Secretary.

A. S. KERRY,
By J. C. VEAZIE,
His Attorney.

(Seal, Columbia & Nehalem
River Railroad.)

NATIONAL SURETY COMPANY
By GEO. W. ALLEN,
Resident Vice President.

ROBERT WHYTE,
Resident Assistant Secretary.

(Seal, National Surety Co.)

The foregoing bond is hereby approved to operate
as a supersedeas to said judgment and injunction.

CHAS. E. WOLVERTON,
District Judge.

Countersigned at Portland, Ore. April 25, 1916.

NATIONAL SURETY COMPANY,
By MARC HUBBERT,
Resident Agent.

Filed April 26, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on Wednesday, the 26th day
of April, 1916, the same being the 45th Judicial
day of the regular March, 1916, term of said Court;
Present: the Honorable Charles E. Wolverton,
United States District Judge presiding, the fol-
lowing proceedings were had in said cause, to-wit:

ORDER ALLOWING APPEAL AND ORDER
STAYING EXECUTION.

At this time came the Columbia and Nehalem River
Railroad, a corporation, and A. S. Kerry, the above

named defendants, and presented their petition for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit and assignments of error accompanying the same, and upon consideration of the said petition, the Court hereby allows such appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause. And the said defendants now presenting and filing their bond upon an appeal and for a supersedeas, in the sum of five thousand dollars (\$5000), with the National Surety Company of New York as surety, the said bond is hereby approved, and

IT IS ORDERED that the operation and effect of the judgment and decree heretofore entered in this cause, including the injunction order therein contained, be, and the same are hereby, stayed and suspended until said appeal is heard and decided by said Circuit Court of Appeals.

Dated this 26th day of April, 1916.

CHAS. E. WOLVERTON,
District Judge.

Filed April 26, 1916.

G. H. MARSH, Clerk.

And afterwards, to-wit, on the 9th day of October, 1916, there was duly filed in said Court and cause, a statement of the evidence in words and figures as follows, to-wit:

Testimony of Elbert G. Chandler.

STATEMENT OF THE EVIDENCE.

Elbert G. Chandler being called as a witness on behalf of the plaintiffs, and duly sworn, testified as follows:

I am Manager of the Northwestern Equipment Company; am a mechanical engineer; I am the patentee named in the United States patent No. 1,140,875; that is my invention and I am the owner of the invention and of the letters patent.

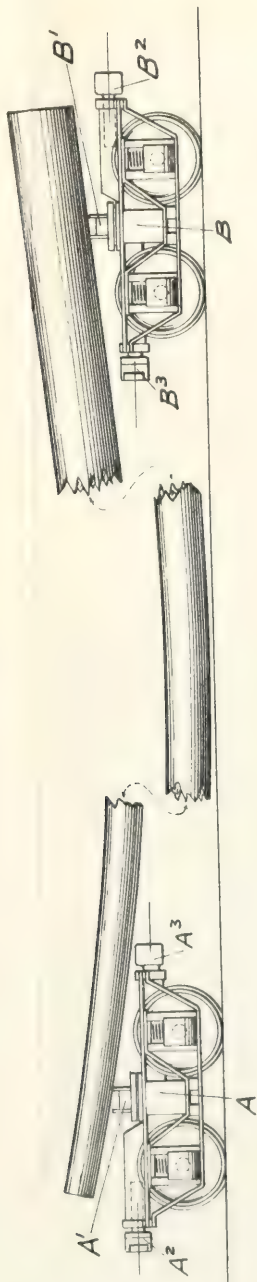
The said patent was then offered and received in evidence without objection, and marked "Complainants' Exhibit 1," and is as follows:

PLAINTIFF'S EXHIBIT "1"

E. G. CHANDLER.
LOGGING TRUCK.
APPLICATION FILED FEB. 25, 1915.

1,140,875.

Patented May 25, 1915.



Witnesses:

J. M. Hoffman
J. M. Hoffman

Robert G. Chandler
Inventor,

By *A. H. Fitzgenberg* Att'y.

UNITED STATES PATENT OFFICE.

ELBERT G. CHANDLER, OF PORTLAND, OREGON.

LOGGING-TRUCK.

1,140,875.

Specification of Letters Patent.

Patented May 25, 1915.

Application filed February 25, 1915. Serial No. 10,571.

To all whom it may concern:

Be it known that I, ELBERT G. CHANDLER, a citizen of the United States, residing in the city of Portland, county of Multnomah, and State of Oregon, have invented certain new and useful Improvements in Logging-Trucks, of which the following is a specification.

My invention relates to logging trucks, such as are used in pairs for hauling long logs, one truck being placed under each end of the log. It is quite common for these logs to be as much as ninety feet long, and because of their length, and the distance between the trucks, which must necessarily be placed near the ends of the logs, said logs sag in the middle sometimes low enough to almost engage the track. Because of this sagging, the logs frequently engage and rest upon the inner ends of the truck frame, and the draw-bar thereof, and thus operate to prevent the trucks from turning under the log-bunk thereupon, which frequently results in the derailment of a truck.

The object of my invention is to provide such an improvement in logging trucks, which are used in pairs at the opposite ends of long logs, that no matter how much the logs sag between the trucks, they will not engage the truck frame, nor the draw-bar thereof. I accomplish this by constructing the trucks so that the draw-bars at the outer ends thereof are at standard height, and are adapted to be coupled to the draw-bars on standard railroad equipment, while the draw-bars on their inner, or adjacent, ends are positioned considerably lower than are the outer draw-bars, thus giving clearance for a log resting upon the car-bunks, to sag to the limit without interfering with the inner ends of the trucks or the inner draw-bars.

When returning the logging trucks empty, they are, of course, readily coupled together at their inner ends, because at their inner or adjacent ends, the draw-bars, while lower than the standard draw-bars, are of substantially the same height and can be coupled together, while the draw-bars at their outer ends are standard height.

In order that others may thoroughly understand my invention, I have shown in the accompanying sheet of drawings, one practical embodiment of the invention, which I will now describe.

In the drawings, I have shown in side ele-

vation a pair of logging trucks with a long log supported thereon at its opposite ends, with two portions thereof broken out, to reduce the length of the figure, but showing the middle portion in substantially the position it would occupy, sagging almost to the track, as is common where these very long logs are thus supported.

In the drawings one truck is designated A, and the other truck is designated B. Each is provided with a log-bunk, as A¹ and B¹, adapted to turn upon the truck in the usual manner, and upon which the opposite ends of the log rest, substantially in the manner indicated. Each truck is provided at its outer end with a draw-bar, as A² and B², of standard height so as to be coupled into a regular train, and each is also provided on its inner end with a draw-bar, as A³ and B³, positioned considerably lower than the outer draw-bars, but adapted to be coupled together when the trucks of each pair are brought together to be returned empty.

So far as I am aware, I am the first to provide a pair of logging trucks having their draw-bars at their outer ends at standard height, and having their inner ends constructed low to give clearance for the sagging of the logs placed thereupon, with their inner draw-bars also below standard, to avoid interference with the sagging log, and thus to avoid the serious objection of the logs engaging and resting upon the inner ends of these logging bunks, and the inner draw-bars, and interfering with their following the track upon which they are to run.

What I claim and desire to secure by Letters Patent is,—

1. A pair of logging trucks having at their outer ends draw-bars at standard height, and having at their inner ends, draw-bars arranged below standard height, whereby to give clearance for sagging logs thereon, and at the same time being adapted to be coupled to each other, when said trucks are brought together.

2. A logging truck having a log supporting bunk thereupon, and provided at one end with coupling means at substantially standard height, and at its other end with coupling means considerably below standard height, substantially as and for the purpose indicated.

3. In combination two logging trucks,

each provided with log supporting means, and each having at its outer ends coupling means positioned at substantially standard height, whereby to be coupled to standard
5 equipment, and each having at its inner end coupling means positioned below standard height, whereby to give clearance, and adapted to be coupled together.

10 4. A logging truck having a log bunk pivotally mounted thereupon, a draw-bar at one end mounted at standard height, and adapted to be coupled to standard railroad

equipment, and a draw-bar at the opposite end of said truck below the top of the frame thereof, and below standard height, to give
15 clearance forwardly of the log bunk, substantially as, and for the purpose described.

Signed at Portland, Multnomah county, Oregon, this 19th day of February, 1915.

ELBERT G. CHANDLER.

In presence of—

HERMAN MOELLER,

I. M. GRIFFIN.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents
Washington, D. C."

Testimony of Elbert G. Chandler.

The witness proceeded and testified as follows:

I am engaged in the manufacture and sale of this invention; we build logging trucks of all kinds and they are built by the shops and are sold through the Northwestern Equipment Company of which I am an officer and director and one of the stockholders; the Northwestern Equipment Company has a license from me for handling the sales; it is an oral license; as an officer and director and one of the principal stockholders, I am simply doing business through the Northwestern Equipment Company in selling this invention; I think it was in the Fall of 1913 that Clark and Wilson asked us and the Seattle Car Company and the Russell Car and Foundry Company to send them two sets of trial trucks, it being their idea to try out these three types and decide which was best for their use; we and the other two concerns sent sample trucks, and Mr. Van Cleve, who was then our salesman called on the Clark and Wilson Company several times during the winter to watch the operation of our trucks and see that any small difficulties that might be encountered were taken care of. After one of his visits to Clark and Wilson camp he stated that Mr. Withrow had complained about all of the trucks giving trouble from the logs bellying down and hitting the inside draw-bar, and that if they bought any more trucks they would want a truck that would take care of this difficulty; we studied the matter over to a considerable extent; there were several ways in which the matter could be taken care of, but most

Testimony of Elbert G. Chandler.

of them had some objection, either to the Interstate Commerce rules for common carriers, or some other objection, and all of them were discarded; we finally decided that the construction of the truck would permit us to use the idea of a high-low draw-bar, that is a draw-bar of standard height on the outside to connect with the standard equipment which was already on the road, and we hit on the idea of lowering the other draw-bar to a considerable extent below that point to take care of any bellying down that the logs might have during the transportation; there were some difficulties that we ran up against in the construction, but these were mechanical difficulties that we finally overcame. The next time Mr. VanCleve called upon Clark and Wilson he told them that we would in the future be prepared to furnish them with trucks having a draw-bar of standard height on one end and a draw-bar of considerable lower height on the other side; Mr. VanCleve stated that Clark and Wilson told him that if we could build them cars with a high-low draw-bar, that was the kind of truck they would want; that Mr. Withrow, or any one connected with Clark and Wilson, did not suggest to me the idea of a high draw-bar at one end of a logging truck and a low draw-bar at the other end. I worked that idea out after Mr. VanCleve reported the objections made by Mr. Withrow; it took time and study to work this idea out and embody it in a practical logging truck; we were working on the idea some two or three months; that in the past there had been logging trucks built with draw-bars having a standard height of $34\frac{1}{2}$ inches above

Testimony of Elbert G. Chandler.

the top of the rail and logging trucks with draw-bars having a lower height at both ends, the draw-bars on either end being at the same height but in different cases this height varied, being sometimes 26 inches and sometimes $34\frac{1}{2}$, and sometimes between those heights to suit the individual requirements of the particular case, but in no case did the logging truck have a coupler at one end at a considerable distance above that on the other; the draw-bars were in alignment so that the line of draft was direct; in the past they have taken care of the difficulty of these sagging logs in some cases by using a very low draw-bar on either end of the truck and using a goose-neck to connect it with the higher draw-bars on the standard equipment, the logging trucks having low draw-bars on both ends; in some cases the height of the bunk has been raised far enough above the draw-bars to give clearance while the logs were being transported; that in November, 1914, I think it was, Mr. Kerry wrote us a letter stating that in the early part of 1915 he would be in the market for forty sets of logging trucks, and that he was asking the Seattle Car Company and the Russell Car and Foundry Company, as well as ourselves, to send down a sample truck which he could use and decide which truck was best for his service, and on receipt of his letter I wrote him and asked him if he would allow us to send him a new type of truck which we had developed having a high draw-bar on one end and a low draw-bar on the other, and we set forth in this letter the advantages this type of construction had; this was around the latter part of

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November; Mr. Kerry answered that he would be glad to have us send this truck, and that with the long logs which he was going to handle the trucks would certainly need all the clearance that we could give them; we sent down a set of sample trucks having this idea of the high-low draw-bar embodied in it; the other companies sent sample trucks having draw-bars of standard height, $34\frac{1}{2}$ inches on either end, and all three trucks were put into service; after Mr. Kerry had tried out the trucks I went down there one day, and he gave me an order for forty sets, and five days after that he came to town and stated that representatives of the Seattle Car Company had been down to his place and made him a considerable lower price and offered to build him the identical truck of which we had sent down sample, and that as they were willing to build this truck at a lower price than we had taken the order for he felt at liberty to cancel the order, and that he would allow us to furnish twenty sets of the trucks at the same price quoted by the Seattle Car Company, and if we didn't want to do this he would have to give them the entire order.

Thereupon, in response to questions by the Court, the attorney for the defendants stated defendants were using trucks built by the Seattle Car and Foundry Company having one draw-bar of standard height and another below standard height.

The witness proceeded and testified as follows:

We filled part of the order furnishing twenty pairs of trucks; the price we gave Mr. Kerry on the original

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order of forty trucks was \$700 per set, and the price we were compelled to take on the twenty sets was \$625 a set, being a reduction of \$75; the twenty sets that we furnished cost us \$614 a set; I have seen the trucks furnished to the defendants by the Seattle Company, and they are similar to our truck, having high draw-bar and the low draw-bar. At the time Mr. Kerry informed me that he would have to place his order with the Seattle Company, I notified him verbally that this was my invention and afterwards notified him by letter and he told me that he had secured a guaranty from the Seattle Car and Foundry Company against loss through infringement on our truck or any other; the other companies did not furnish sample trucks with the high and low draw-bars, but furnished standard trucks, that is, with standard draw-bars at both ends; Mr. Kerry did not suggest this idea to me, nor did any one else; I worked that out as a solution of difficulties which had been reported by our salesman; after getting the order from Mr. Kerry, and before receiving the notice of cancellation, we had ordered such parts as we did not already have in stock to fill the order for forty sets of trucks; Mr. Kerry knew that I had applied for a patent; I notified him before we had received the patent that we had applied for one, and also after the patent was issued; I notified him after receiving the formal notice of allowance of the application.

Thereupon plaintiffs offered in evidence a letter from Mr. Kerry, dated November 14, 1914, addressed

Testimony of Elbert G. Chandler.

to the Northwestern Equipment Company, and the same was received without objection, marked "Complainants' Exhibit 2," and is as follows:

"Clatskanie, Ore., Nov. 14, 1914.

Northwestern Equipment Co.,
Portland, Ore.

Gentlemen:

Some time in February, 1915, we will be in need of 40 sets of disconnected 100,000 capacity standard height logging trucks. We are asking the Seattle Car and Foundry Co., The Russell Car & Foundry Co. and yourselves to furnish one set of these trucks, each naming a price delivered at Kerry, Ore., on the S. P. & S. We will buy one set of trucks but may not pay for them until we place the order for the balance. You may ship us one set whenever you have them ready.

Yours truly,

Columbia & Nehalem River R. R.,

By A. S. Kerry, President."

Plaintiffs then offered in evidence a letter dated November 17, 1914, from the Northwestern Equipment Company to A. S. Kerry, and the same was received in evidence without objection, marked "Complainants' Exhibit 3," and is as follows:

Testimony of Elbert G. Chandler.

"Nov. 17, 1914.

Mr. A. S. Kerry, President,

Logging Trucks.

Columbia & Nehalem River R. R. Co.,
Westport, Oregon.

Dear Sir:

We duly received your favor of November 14, and are glad to know that you are going to buy 40 sets of trucks.

We note that you want the draw-bar to be of standard height, that is, $34\frac{1}{2}$ inches from top of rail to center of draw-bar. In this connection, would say that Clark & Wilson found that where they used the standard height coupler on their trucks and hauled very long logs the logs bellied down and interfered with the inside coupler, and they told us that if they ordered any more trucks they would want us to furnish them a truck having the outside couplers of standard height and the inside couplers 10 inches lower. I am making a sketch to explain more fully the point that I am trying to bring out, and if after thinking this over you decide that you would like to have us send you a set of trucks in which the couplers are of different heights, we would be glad to do it.

As long as you are getting three different types of truck, it might be a good idea to embody as many ideas as you could in the three sets and then make up your

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own design from the three and let everybody bid on them, as all of the manufacturers can build any type of truck which you desire.

We have always found that the arch bar truck, while a little more expensive, is easier to repair in case of wrecks and does the work considerably better than a cast steel frame. At the same time, if you want a cast steel frame, there is no reason why we could not furnish it, and we would be glad to send you both an arch bar and a cast steel frame truck, if you so desire. Probably, however, you want to get as few odd trucks as possible, and as the other people will undoubtedly send you a cast steel frame truck you may not want us to do the same. Unless we hear from you to the contrary, we will therefore simply furnish you with an arch bar truck having outside couplers standard height and inside couplers 10 inches lower. It is the writer's opinion that as far as trucks go the bunk is the solution to the whole problem, and whoever gives you the best bunk gives you the best car.

If you care to do so, the writer would be glad to meet you at Rainier, look over the Hammond Lumber Co.'s trucks at that point and take advantage of any suggestions they may have to offer; then go down to Clark and Wilson's camp and get any suggestions which they have to offer on the three or four different types of trucks which they have; and then build you a sample car to correspond. We are very anxious to secure your order and we want to spend enough time on the subject

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to give you exactly the truck which you need for your service.

Awaiting your early advices on this matter, we remain.

Yours very truly,
NORTHWESTERN EQUIPMENT CO.
By....."

Plaintiff then offered in evidence the reply to this letter dated November 21, 1914, which was received without objection, marked "Complainants' Exhibit 4," and is as follows:

"Clatskanie, Ore., Nov. 21st, 1914.

Northwestern Equipment Co.,
Portland, Ore.

Gentlemen:

Answering your favor of recent date in regard to logging truck. You are no doubt right about the inside draw-head. All of our disconnected cars will be used for hauling long stuff and would be a failure if the log got on the draw-head. We have asked the others to figure on automatic couplers which are to be provided with slot with link and pin.

Yours truly,
COLUMBIA & NEHALEM RIVER R. R.,
Per A. S. Kerry, Pres."

Testimony of Elbert G. Chandler.

On cross examination the witness testified as follows:

I hit upon the idea somewhere during the early spring of 1914; I can not tell the exact date; the idea of using the high draw-bar on one end and the low draw-bar on the other; I can not give the exact date; I would not say it was some months after Mr. Withrow made this complaint to Mr. VanCleve; we were working on the idea, or on a solution for that, some thirty or forty days, I should say; I don't know that I could tell how long it was after Mr. Withrow made the complaint before I communicated my solution to him; it was during one of Mr. VanCleve's visits at their camp; he stated what we had worked out on it to Mr. Withrow; I first conceived the idea that this was a patentable invention at that time; I made my application in February, 1915; in the meantime, I had not, to my knowledge, informed any one that I claimed this idea as my own exclusive idea; I didn't talk with Mr. Withrow myself; the idea of patenting this invention was first conceived by me in 1914, and the first step towards patenting it was taken after the first truck had been built and put into service at Mr. Kerry's camp; I can not tell the exact date; I don't know whether I made the application for patent before or after Mr. Kerry gave the order for the forty trucks; it was about that time; I first informed Mr. Kerry verbally that I claimed a patent on this idea at the time he cancelled the order, and stated that the Seattle Car Company were going

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to furnish him the exact type of truck; I do not claim there is any novelty in the idea of having one end of the frame of a truck or of a car higher than the other; I have never seen a logging truck having a frame on one end higher than the other; when these logging trucks were loaded and working in pairs I would say that the logs served as the body of the car if you want to call the two sets or the two trucks a car; when two sets of logging trucks are loaded the logs perform the same service with reference to the trucks in joining them together that the body of an ordinary car performs for the two sets of trucks under the car; when the trucks are not loaded each truck is handled as an independent car and ordinarily has couplers at both ends; there is a running board on most of the trucks which you could call a platform; you might call it a car, but the ordinary conception of a flat car would be a car having a platform fully decked over, and these are not fully decked over; I have never seen a logging truck with platforms fully decked over; I have never seen a car truck having a frame; the ordinary car truck has no end frame; it is entirely different than a logging truck in that respect; I have not seen one having the side frames at one end higher than those at the other with the exception of certain trucks used on street cars; I have noticed the Brill trucks on the street cars that pass in front of this building; they use a smaller wheel on one end of the truck than they do on the other and the connecting frame is naturally lower on that end.

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The witness was then asked the following questions and gave the following answers thereto:

Q. That, then, is an old and common device, is it not; to lower the frame of the car at one end lower than the other, so as to meet different requirements the situation presents?

A. Well, this case that you have just brought up is not a car, but a truck, as I understand.

Q. That is a truck, yes.

A. The end or the frame of the car you cannot compare. I could not draw a comparison between a street-car truck of that type and the ordinary flat-car.

The witness proceeded and testified as follows:

I don't recall any other kind of car trucks in common use having one end of the frame of the truck higher than the other, but would not say that there are none; there is no novelty in having both ends of a logging truck lower than standard equipment, and I was aware of that fact when I made application for this patent; I knew at that time that it was a very common practice to have a logging truck with both ends below standard height; when this complaint was made to me by Mr. Withrow several means suggested themselves to me for overcoming the difficulty; an offset link or goose-neck could be used in connection with a truck having extremely low draw-bars on either end, and the goose-neck offset sufficiently to couple the lower draw-bars of the truck to the higher draw-bars of standard equip-

Testimony of Elbert G. Chandler.

ment; that is something in common use, but on certain roads which are common carriers it is prohibited by Interstate Commerce rules; another idea would be to raise the bunk, bolster it up to a position that would give plenty of clearance for even a standard height draw-bar, but this has a number of objections; it would raise the center of gravity too high; structurally it has some other objections, but the main objection is getting your center of gravity too high; the only other solution that we hit upon was this method of the high and low draw-bar; in a way the whole question of dealing with these long logs is one of relative height between the bunk and the inner draw-bar; that is the sole question leaving aside difficulties of construction; the primary difficulty is to provide a sufficient difference in height between the top of the bunk and the draw-bar; if the purchaser wants a car with a low truck the difficulty can be solved by simply putting a high bunk on a low car and then using this goose-neck connection to the front car or the engine; that would be a satisfactory solution in such a case; a high bunk could be used on a high car, but there would be structural difficulties and the question of the center of gravity; Mr. Kerry has a standard road on which he uses standard equipment and standard coupling devices so I knew he had to have draw-bars coupling cars together at standard height and could not use the low cars; I don't know whether he could have used the low trucks or not; it depends somewhat on the charter he is working under; I was attempting to evolve a car which could be used by a road under the

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Interstate Commerce Act, a car which would allow a common carrier to use cars of both types having a standard height and connecting them with an automatic coupler; the difference between the height of the inner and outer draw-bars of these logging trucks which we constructed is about ten to twelve inches; I didn't specify the extent of that difference in my claims for a patent; I think the patent covers any difference there may be between high and low draw-bars; before I invented this car the only device I know of for coupling low logging trucks to standard equipment was the goose-neck; I have seen logging engines having at the rear end a pocket casting with slots at different heights so that it can accommodate the coupling of cars of several different heights, but that casting, so far as I know, is always used in connection with a link and pin coupler or goose-neck; at the time I received this suggestion or complaint from Mr. Withrow we made some sketches for this type of car at the office; I don't know whether we have those or not; they were rather of a rough nature; we did not work out the mechanical details at that time; we applied the idea in a working car at the time we sent the sample car down to Mr. Kerry; that was the first car that was sent out, and that is the first time I ever really worked the idea out into practical form; the idea came to us at an earlier date than that, but it was never worked out in a working model for the reasons that there are only a few roads upon which this device would be of advantage; the idea had never been put into actual use until I furnished this sample

Deposition of J. R. Van Cleve.

car to Mr. Kerry; I furnished this sample truck to him either the latter part of 1914 or the first part of 1915, I can not give the exact date.

Upon re-direct examination the witness testified as follows:

In a logging truck the draw-bars are an integral part of the truck itself, while, in a street car the draw-bars are an integral part of the body; if you drew a comparison between the two the draw-bars on the logging truck, to make it analogous, would have to be attached to the load, the log itself; in street-cars, flat-cars, freight-cars and passenger-cars the draw-bar mechanism is attached to the body of the car and not to the truck; as they are ordinarily built there is no coupler or draw-bar on the inner ends of the trucks; there are no couplers for coupling the trucks together; there is no occasion for it; one of the objects in having couplers on these logging trucks is so that when the trucks are returned empty they are brought together and coupled by means of the low draw-bars, just the same as two cars are coupled together; they can be coupled and disconnected.

Plaintiffs then read in evidence the deposition of J. R. VanCleve as follows:

I am fifty-four years of age, live at Elko, Nevada, and at the present time am master mechanic for the Western Pacific Railway; I was employed by the Northwestern Equipment Company of Portland, Oregon, as salesman from January 1st, 1913, to about December

Deposition of J. R. Van Cleve.

1st, 1914; I called on the Clark & Wilson Lumber Company several times. "The chief object of these calls was to watch the service given by two sets of our logging trucks which the Clark & Wilson Lumber Company had purchased and was using. I talked with Ira Withrow. Until their purchase of our trial sets of logging trucks as well as two or more sets of other manufacture, they had been handling their logs entirely on flat cars with couplers of the Master Car Builders standard height, this made it necessary to give them a logging truck with a coupler of Master Car Builders height, so the logging trucks could be used in connection with the flat cars. The Master Car Builders standard height of couplers is in the neighborhood of a foot as near as I can recall higher than the coupler of the ordinary logging truck. The Clark & Wilson Company was at this time making the practice of getting out and moving their logs in full tree lengths, and Mr. Withrow explained to me that these very long logs on account of their sagging down of their own weight, between the trucks which were placed under either end of the log, were giving trouble striking the inside coupler. It was my practice to report any such troubles or difficulties to our Manager, Mr. Elbert G. Chandler." "I reported to Mr. Elbert G. Chandler that the inside couplers of the Clark & Wilson Lumber Company's logging trucks were giving trouble by striking the long logs they were handling on account of these logs sagging down between the trucks." "Mr. Chandler solved the troubles which I reported to him the Clark & Wil-

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son Lumber Company was having with the high couplers on our logging trucks." On one of my trips I advised Mr. Withrow, the representative of the Clark & Wilson Lumber Company that I had reported this trouble to Mr. Chandler, and he had developed a truck with one high and one low coupler which would entirely do away with this trouble. His reply to this information, as near as I can recall was, "If you people can furnish that kind of a logging truck, that is the kind we want."

The plaintiff then rested.

Ira L. Withrow being called as a witness on behalf of defendants and duly sworn testified as follows:

I reside at Goble, Oregon, and am Superintendent of the Columbia Timber Company, and held the same position in the Fall of 1913 and during the year 1914; that is the same as the Clark & Wilson Company, Clark & Wilson owned the Columbia Timber Company; they were operating down at Goble in 1913 and 1914: I remember the occasion when the Northwestern Equipment Company, and certain other companies, furnished Clark & Wilson some sample logging trucks along about the Fall of 1913; I think they came about November, 1913; we have some of them in use yet, having purchased some of them: the trial of these trucks lasted until along in 1914, early in the Spring; we were hauling long logs at that time and we experienced difficulty by reason of the interference of these long logs with

Testimony of Ira L. Withrow.

the inner draw-bars of these trucks; these sample trucks had draw-bars of standard height, 34½ inches above the rail and both draw-bars of each truck were of the same height; the difficulty we experienced was that these long logs were sagging down in the middle so they would strike the draw-bar and we had trouble making them take the curves, etc.; I had a conversation with Mr. VanCleve, the salesman of the Northwestern Equipment Company regarding that question; he was there one day and we were having trouble with the trucks, and I told him he would have to do something and that the proper way to do would be to drop the draw-bars, and he said that as we had the standard coupler flat-cars on the outside—he looked it over and thought it would be a good idea. At first he thought it would not do because if we set out one of them we would have to set out the pair; I explained to him that this made no difference as they all had to go in pairs any way; he said he thought that would be a good idea; this was in the early part of 1914, sometime in the Spring; I would not say just when; it was during one of his trips down there; it is not true that I complained to Mr. VanCleve without suggesting any remedy or that Mr. VanCleve came and told me about this idea after reporting to Mr. Chandler and having him study the question; I told Mr. VanCleve.

Upon cross-examination the witness testified as follows:

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I suggested this idea to Mr. VanCleve—this idea of the high and low draw-bar; I thought it was a practical construction; I suggested the same thing to Mr. Vachon of the Seattle Car Company; I never made any sketches of it; I just told him it could be done; we were looking at the trucks one day there—there was no way decided on how it should be done; I am quite positive that that idea came from me, and I suggested it to Mr. VanCleve; I suggested to Mr. VanCleve the difficulty that was being experienced and also that the draw-bar should be dropped; we said that we wouldn't buy any more unless this was done; that we would order no more trucks without the inside draw-bar being lowered; we never bought any after that; we had these ordered at the time this came up with the standard draw-bar at both ends; the cars were delivered probably three or four months after that, but we didn't have this idea embodied in them because they were ordered before this question came up; they were ordered from the Seattle people with the standard draw-bar at each end; we never wrote them to see whether it would be possible for them to change; we never had any logging trucks with draw-bars arranged one high and one low; we never have ordered any trucks since that time; the Seattle trucks which were furnished us had the standard draw-bar at both ends; I talked about this idea with Mr. Vachon of the Seattle Car and Foundry Company one day during his visits down there; it was sometime last Summer that I first learned that the Northwestern Equipment Company was furnishing logging trucks with high and low

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draw-bars; I think it was Mr. Clark who called it to my attention; we never ordered any trucks from the Northwestern Equipment Company except the two sets we got on trial there; the suggestion that these trucks could be made with high and low draw-bars was made when Mr. VanCleve and I were talking about it that day; I do not remember that Mr. VanCleve called on me afterwards and told me that they were in a position to furnish us trucks having high and low draw-bars; he called on us quite frequently at first to see how the trucks worked; we had his trucks against the Seattle people's trucks and the Russell trucks, and I notified him that we were having this difficulty with all trucks—the long logs interfering with the draw-bars; that was a common objection with all logging trucks having a standard height; we never used the low trucks; I told the Seattle Company it would be a good idea to have trucks built that way to lower the draw-bars; I told them that along in the Spring of 1914, I could not say just when, but it was during some of their calls; we just talked about it, that it should be done on account of the long logs sagging; we are hauling long logs at the present time and still using trucks with both high draw-bars; we find we have trouble on account of interference by the logs, but we are getting along with the ordinary high trucks with high draw-bars; we have had accidents caused by the logs sagging down on the draw-bar, but have not taken any steps to have the trucks reconstructed by lowering the draw-bars, but if we ever ordered any more trucks we would order them

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with the low draw-bar at one end; this would require considerable reconstruction on a car of this type after they are already built; we commenced hauling these long logs sometime after the first of February, 1914; we commenced operations on the 9th of February and started hauling long logs shortly afterwards; we started cutting long logs then; the buckler might have been a couple of weeks, or such a matter, ahead of the bunks when we started up; we started hauling about ten days or two weeks after the 9th of February, and Mr. VanCleve was down there on the visit that I spoke of soon after we started up; it was at that time that I made this suggestion to VanCleve that the difficulty could be overcome by dropping the draw-bar at one end of the truck; I didn't suggest any way of doing that no more than just dropping the draw-bar; after I talked with Mr. VanCleve about it I took it up with the Seattle Car Company; it was along about the time we talked about it—there was nothing said in the order—the order was in; it was about three months after this conversation with Mr. VanCleve that we received the order from the Seattle Company; we didn't take up with them the question of making those trucks with the low draw-bar; the order had been placed and we let it pass; we have no trucks with the low draw-bar.

Thereupon the defendants offered in evidence the file wrapper of Mr. Chandler's application, which was received in evidence, marked "Defendants' Exhibit A." The following portion of said file wrapper being a letter

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from the Examiner in the Patent Office to Mr. Litzenberg, the attorney for Mr. Chandler, the applicant, dated March 4, 1915, was read.

“This application has been examined. Attention is called to Number 951,253, Magor, March 8, 1910; Fig. 3; Trucks, Four Wheel, Bogies. It will be noticed that the couplings at each end of the truck are below the standard height. This is apparent by comparison thereof with the height of the wheel—the height being about the same as that shown in applicant’s drawing for his lower coupling. It is held that there would be no invention in elevating one of these couplings to standard height. All the claims are therefore rejected on the reference and for the reason stated.”

The following portion of said file wrapper being the argument of the attorney for the applicant accompanying an additional claim filed in consequence of the above letter of the Examiner was read, and is as follows:

“Reconsideration of the case is respectfully asked for the reason that the Magor patent referred to does not in any way suggest the idea which constitutes the invention of this application. There is absolutely nothing to indicate whether the draw-bars of the Magor patent are below the standard height or not. The principal object of the Magor invention is to provide a car truck in which the pull upon the draft rigging of the truck is communicated as directly as possible to the

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load. In order to take as much of the draft strain as possible from the trucks themselves. In the present case the draft rigging is connected directly to the bunk, and in accordance with the present improvements is pivoted thereto so that as the logging train takes a curve the two bunks of each co-operating pair of bunks may remain parallel while the draft rigging on each truck may swerve sufficiently to preserve its alignment with the co-operating draft rigging and the connecting rod between the two. There is absolutely no suggestion in the patent that the draft rigging of these trucks is below standard, and the position of the draft rigging relative to the supporting part of the car bunk, as shown in the drawings, Fig. 5, of the Magor patent, very clearly indicates that the very objection which applicant is seeking to overcome would be present in the Magor device. It is well known that patent office drawings are illustrative only of the invention, and there cannot properly be any comparison between the drawings of one case and the drawings of another as to proportions. If this were true, then the distance of applicant's low draw-bars below the bunk, is much greater than the distance between the supporting surface of the Magor car bunk and his draw-bars. On the other hand, applicant's standard draw-bar is about the same distance below the supporting surface of his car bunk, as are both of the Magor draw-bars below the supporting surface of his car bunk, see Fig. 5. It will be noticed of course, that the Magor bunk has at its opposite ends the upstanding bunk stakes W, which give the appear-

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ance that the car bunk is considerably above the draw-bar.

This, however, is not the question involved. The Supreme Court has decided that 'The idea is the invention. The fact that the carrying out of this idea is simple, does not negative invention, but really supports it.' *Gill v. U. S.*, 160 U. S. 426.

The idea constituting the invention of this application brings into existence an improvement in car bunks which overcomes a very common objection, clearly set forth in the opening statement of this application, and an idea which has not yet been brought forth in the prior art.

It is most earnestly hoped the Examiner will give early and favorable consideration to this application, as it is one of considerable importance in this part of the country where the handling of long logs on logging railroads built through rough country, is necessary, and where every precaution must be taken for safety."

The defendants then offered in evidence a certified copy of the Magor patent referred to in the above letters. In connection with this offer the attorney for the plaintiffs admitted that it is a very common practice to have both draw-bars of logging trucks below the standard height. Said certified copy was received in evidence and marked "Defendants' Exhibit B," and omitting the certificate, is as follows:

961,253.

B. MAGOR,
CAR TRUCK.
APPLICATION FILED APR. 23, 1906.

Patented Mar. 8, 1910.
3 SHEETS—SHEET 2.

Fig. 3.

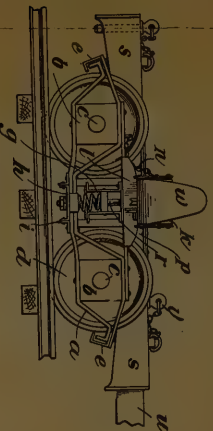
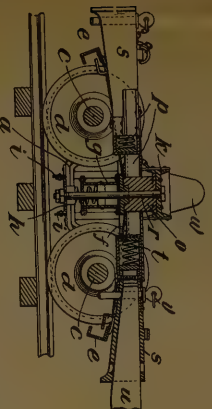


Fig. 4.



Fig. 5.



Attest:
M. A. Thompson
John W. Thompson

Inventor:
Basil Magor
by A. A. Anderson
Attys.

951,253.

B. MAGOR.
CAR TRUCK.

APPLICATION FILED APR. 23, 1908.

Patented Mar. 8, 1910.

3 БНБЕТВ-ВНХЕТ 3.

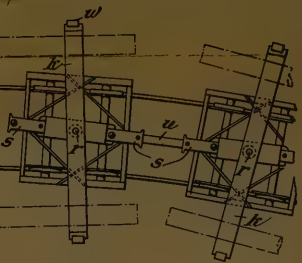


Fig. 6.

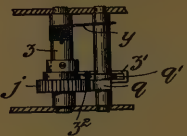


Fig. 8.

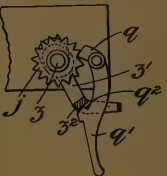


Fig. 7.

Attest:
Matth. Thompson.
John W. Thompson

Inventor:
Paul Shapiro
by S. Dale Wendler Tanner
Attys.

UNITED STATES PATENT OFFICE.

BASIL MAGER, OF NEW YORK, N. Y.

CAR-TRUCK.

951,253.

Specification of Letters Patent.

Patented Mar. 8, 1910.

Application filed April 23, 1909. Serial No. 491,767.

To all whom it may concern:

Be it known that I, BASIL MAGER, of the borough of Manhattan of the city of New York, in the county and State of New York, have invented certain new and useful Improvements in Car-Trucks, of which the following is a specification, reference being had to the accompanying drawings, forming a part hereof.

The principal object of the invention is to provide a form of car truck which shall be particularly adapted for the transportation of logs. For such work, it is common practice to provide each car truck with a long transverse member, known as the bunk supported above the car trucks upon the bolster and adapted to receive the ends of the logs; and two such trucks, when thus joined together by a load of logs, constitute a single car or element of the logging train and require no other connection between them than the logs themselves. In these logging trains, it is desirable that the pull upon the draft rigging of the trucks be communicated as directly as possible to the load in order to take as much of the draft strain as possible from the trucks themselves. In the present case, the draft rigging is connected directly to the bunk and, in accordance with the present improvements, is pivoted thereto so that as the logging train takes a curve the two bunks of each cooperating pair of bunks may remain parallel while the draft rigging on each truck may serve sufficiently to preserve its alignment with the cooperating draft rigging and the connecting rod between the two. Moreover, in accordance with the present improvements, the ends of a connecting rod are received in relatively long connecting heads upon the trucks so that the ends of these rods are brought as near the center of the car trucks as possible, whereby, as the train is backed there will be the less tendency to push the connecting rods and the cooperating draft bars out of alignment.

Another feature of the improvements consists in providing an underling member upon the frame of the truck which member is so arranged above the rails as to support the frame thereupon whenever the wheels accidentally leave the track. This member, moreover, is placed low enough to prevent the wheels from striking the ties and thereby from running over the ties and destroying the track whenever the truck jumps the

track, the truck, in such a case, sliding upon the track through the medium of said member which overhangs the track on each side. Still another feature of the improvement consists in the provision of stakes pivoted upon each side of the bunk to retain the load and means on each side of the bunk to control the stake on the other side, whereby the load may be dropped on either side of the truck by workmen stationed upon the other side of the track.

The improvements referred to will now be described in connection with the drawings and together with other features of 70 improvements which need not be particularly alluded to at this point.

In the drawings: Figure 1 is a plan view of a truck embodying the improvements. Fig. 2 is a view in transverse section, the plane of section being indicated by the line *2-2* in Fig. 1. Fig. 3 is a side view. Fig. 4 is a detail view in plan of one end of the draft bar. Fig. 5 is a view in longitudinal section. Fig. 6 is a view on a smaller scale 80 illustrating the application of the trucks to the carrying of logs. Figs. 7 and 8 are detail views of means for controlling the stakes upon the ends of the bunk.

The frame of the truck will be seen to consist of the two side members *a* provided with suitable bearings *b* to receive the axles *c* of the wheels *d*, and transverse members *e* connecting the ends of the side members which extend, at each end, beyond the wheels. In 90 addition to these side and transverse members, the frame includes diagonal bracing members *f* each of which extends from the center of one of the transverse members to a point near the center of one of the side 95 members. The bolster *g* is spring supported as usual upon the spring-carrying plank *h*, which extends transversely across the frame. In the present case, this plank is arranged underneath the frame, being of a sufficient 100 length to overlie the truck on each side, and is hung low enough so that when the wheels leave the track it will strike the track before the wheels have dropped to the ties, thus leaving the frame supported upon the track 105 and preventing the wheels from running over the ties and tearing up the tracks. In order to limit the sideways motion of the truck when it is thus supported through the medium of this elongated plank, the latter 110 is provided with a cleat or cleats *i* arranged intermediate its ends and projecting down-

wardly so as to come in contact with the truck on either side in case the truck tends to run off the track at that side.

- The bunk k is supported upon the bolster 5 through the medium of side bearing pieces l arranged thereupon and cooperating bearing pieces m arranged upon the underside of the bunk. The latter is pivoted at its center and may thus twist about upon the side bearings on the bolster, its range of movement however being limited by stop chains n which prevent the bunk from working off from the side bearings. Projecting downwardly from the center of the bunk is a cylindrical bracket o which is rigidly secured to the bunk and forms a pivot for the attachment of the draft rigging p which is arranged between the bunk and the bolster. A fastening pin or bolt r is passed through the bunk, cylindrical bracket, draft rigging, bolster and spring plank and fastens all of these parts together.

- The draft rigging is provided with connecting heads s which work against the draft rigging springs t as usual. The heads, however, as will be seen, are considerably elongated so that the ends of the connecting rods u may be carried well in toward the center of the truck where they are secured through the medium of connecting pins v . Thus will the alignment of any two cooperating draft bars and their connecting rod be preserved whether the train is moving forward or backward. On each side of the bunk stakes w for retaining the load are pivoted, the pivots x being beneath the center of gravity of these stakes when they are in their normal positions, so that when released the stakes will drop automatically.
- 40 The stakes are retained in their normal positions through the medium of a chain or cable y , each such chain or cable being connected to means upon the opposite side for raising the corresponding stake into operating position. Such means may consist, for instance, of a roller z to wind the cable on and a ratchet j secured to the roller and controlled by a pawl q . (Figs. 2, 7 and 8).
- 50 The cable may be wound up by a key in setted into one end of the roller z (Fig. 2); and by moving the pawl handle q' to the left in Fig. 2, the pawl is disengaged from the ratchet and the stake upon the opposite side drops by its own weight. A loose arm x' is provided upon the roller z and has a shoulder x'' which fits into a notch q'' on the pawl in order to hold the pawl in a particular position and to prevent the ratchet j and roller z from moving in either direction.
- 60 In Fig. 6, it will be seen what the relative arrangement of the parts is in a logging train made up of the improved trucks, when such train takes a curve. The logs are indicated in broken lines, being stretched across the respective bunks of cooperating trucks.

The forward truck of each pair of trucks is connected to the rear truck of the pair in advance through the medium of a connecting rod u . The two connecting rods shown in Fig. 6 are relatively somewhat shorter than might be employed in actual practice but they sufficiently illustrate the point to be brought out in this figure. Such point is the alignment of the draft riggings on the trucks connected by the rods u ; and it will be seen that the pull upon the forward trucks in each case is applied at the center of the corresponding bunk and that said pull is in the direction in which the track extends at that point and not necessarily normal to the position of the bunk, the latter, as is obvious, being always parallel to the cooperating bunk.

I claim as my invention:

1. The combination with the truck frame, bolster and wheels, of the spring-carrying plank elongated so as to extend beyond the wheels on each side and projecting below the truck frame to a level less than the height of the track from the wheel base.

2. The combination with the truck frame, bolster and wheels, of the spring-carrying plank elongated so as to extend beyond the wheels on each side and projecting below the truck frame to a level less than the height of the track from the wheel base, and means upon the underside of said spring-carrying plank to limit the lateral movement of the truck when supported upon the rails through the medium of said spring-carrying plank.

3. In a car truck, the combination of a bunk to receive the load, and draft rigging pivoted thereto.

4. In a car truck, the combination of a long transverse member to receive the load, downwardly projecting member secured to the central part of said transverse member, and draft rigging pivoted to said downwardly projecting member.

5. In a car truck, the combination of a bolster, a bunk carried thereby for receiving the load, and draft rigging between the bunk and the bolster and pivoted to the bunk.

6. In a car truck, the combination of a bolster, a bunk carried thereon to receive the load, a downwardly projecting bracket secured near the center of the bunk, draft rigging between the bolster and the bunk and pivoted upon said bracket, and a fastening member extending through the bunk, bracket, draft rigging and bolster.

7. In a car truck the combination of a bunk pivoted to the truck, side bearings for the bunk, and a stop chain to limit the relative movement between the bunk and truck.

8. In a car truck, the combination of a bolster, a bunk pivoted near the center of the bolster, side bearings upon the bolster for

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the bunk to rest upon, and a stop chain to limit the relative movement between the bunk and bolster and prevent the bunk from moving off from the side bearings upon the

5 ~~bolster~~

9. The combination of a car truck having pivoted draft bars provided with connecting heads, and a connecting rod for connecting two car trucks, the ends of the connecting

10 rod being adapted to be inserted well into

the corresponding connecting heads of the two trucks, whereby the alignment of the connecting rod and draft bars may be preserved under all conditions.

This specification signed and witnessed 15 this 20th day of March A. D., 1909.

BASIL MAGOR.

Signed in the presence of—

RALPH SAWYER,

PETER P. BECK.

Testimony of Ira L. Withrow.

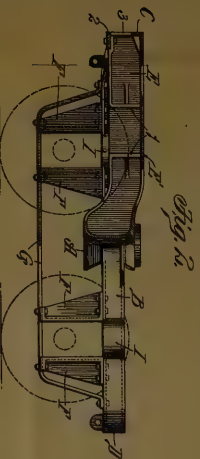
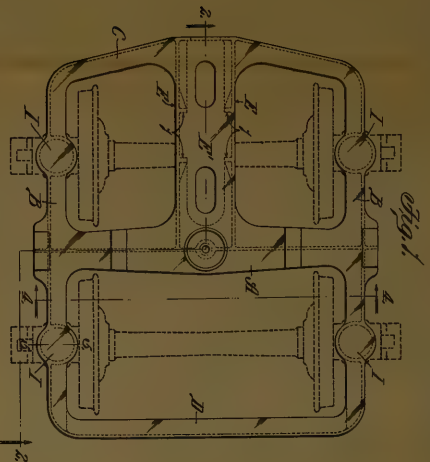
Defendants then offered in evidence a certified copy of a patent issued to Gustav Komarek and referred to in the answer. Said certified copy was received in evidence and marked "Defendants' Exhibit C," and omitting the certificate, is as follows:

1,008,921.

G. KOMAREK.
LOG TRUCK.
APPLICATION FILED AUG. 21, 1911.

Patented Nov. 14, 1911.

3 SHEETS-SHEET 1.



Witness:
Geo. P. Roberts
Walter C. Shovel

Inventor,
Gustav Komarek,
By Paul A. Schuler atty.

1,008,921.

G. KOMAREK.

LOG TRUCK.

APPLICATION FILED AUG. 21, 1911.

Patented Nov. 14, 1911.

2 SHEET-SHEET 2.

Fig. 3.

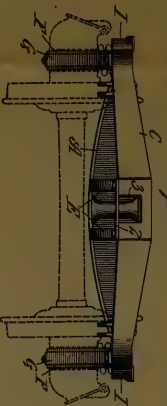


Fig. 4.



Fig. 5.



Witnesses:
Geo. P. Palmer
Wm. R. Palmer

Inventor,
Gustav Komarek,
By Paul R. Palmer atty.

UNITED STATES PATENT OFFICE.

GUSTAV KOMAREK, OF ST. LOUIS, MISSOURI, ASSIGNOR TO CHARLES L. GILBERT, OF ST. LOUIS, MISSOURI.

LOG-TRUCK.

1,008,921.

Specification of Letters Patent. Patented Nov. 14, 1911.
Application filed August 21, 1911. Serial No. 645,166.

To all whom it may concern:

Be it known that I, GUSTAV KOMAREK, a citizen of the United States, residing at St. Louis, Missouri, have invented a certain new and useful improvement in Log-Trucks, of which the following is a full, clear, and exact description, such as will enable others skilled in the art to which it appertains to make and use the same.

10 This invention relates to log trucks, such as are used for transporting long logs, one truck being arranged adjacent each end of the log.

The object of my invention is to provide 15 a log truck of simple construction which can be manufactured at a low cost.

Figure 1 of the drawings is a top plan view of a log truck constructed in accordance with my invention; Fig. 2 is a side elevational view partly in vertical section on the line 2-2 of Fig. 1; Fig. 3 is an elevational view of the front end truck; Fig. 4 is a vertical transverse sectional view taken on the line 4-4 of Fig. 1; and Fig. 25 5 is a vertical transverse sectional view taken on the line 5-5 of Fig. 1.

Briefly described, my improved log truck consists of a cast metal frame provided with a bolster, side end sills and draft beams, 30 all integrally connected together, and pedestals on the side sills for receiving the journal boxes which cooperate with the wheel axles of the truck.

Referring to the drawings which illustrate the preferred form of my invention, 35 A designates a bolster whose end portions are integrally connected to side sills B. The front and rear end sills C and D, respectively, of the truck are integrally connected to the side sills B; and draft sills E, which 40 are arranged between the bolster and the front end sill C, are integrally connected to said bolster and end sill, as shown clearly in Figs. 1 and 2. Pedestals F are secured to 45 the side sills B for receiving the journal boxes which cooperate with the wheel axles of the truck, as shown in broken lines in Figs. 1 and 3, and suitable tie-bars G are 50 and to the side sill on each side of the truck, as shown in Fig. 2. The bunk H, shown in broken lines in Fig. 4, on which the logs rest, is supported upon the bolster 55 A of the truck, and the side frames B are provided with integral pockets I for re-

ceiving springs, not shown, which are arranged between the frame of the truck and the journal boxes.

The side and end sills of the truck are preferably channel-shaped in cross section 60 and arranged with their horizontal legs or flanges projecting inwardly, as shown in Figs. 2 and 4, and the bolster A is preferably I-shaped in cross section, the vertical web of the bolster being integrally connected to 65 the vertical webs of the side sills, and the top and bottom flanges of the bolster being integrally connected to the horizontal flanges of the side sills.

The draft beams E are provided with integral lugs or abutments 1 which cooperate 70 with the follower plates of the draft rigging, not shown, and a carry-iron 2 is connected to said draft beams for supporting the draw-bar which passes through an opening 3 in the front end sill C of the truck. A cover member E', which is formed 75 integral with the draft beams, is integrally connected to the top flange of the bolster and to the top flange of the front end sill 80 C so as to reinforce and strengthen the draft beams and tie them securely to the bolster and to the front end sill. I prefer to arrange the draft beams in a higher horizontal plane than the side sills, as shown in Fig. 2, 85 and therefore the rear ends of said draft beams are curved downwardly at the point where they are connected to the bolster and the intermediate portion of the front end 90 sill C is inclined upwardly so as to provide for this arrangement of the draft beams.

A log truck of the character above-described, is exceptionally strong and rigid 95 and can be manufactured at a low cost because it consists of a one-piece cast metal frame having draft beams formed integral with the bolster and the front end sill of the truck both of which are integrally connected to the side sills of the truck, the pedestals and tie-bars being the only detachable or removable elements of the truck.

Having thus described my invention, what I claim as new and desire to secure by Letters Patent is:

1. A log truck having a cast metal frame which consists of side sills, end sills, a bolster, and draft beams all integrally connected together, and pedestals secured to the side sills.

2. A log truck provided with a front and 110

a rear end sill and side sills integrally connected to said end sills, a bolster integrally connected to the side sills, and draft sills integrally connected to the bolster and to the front end sill and arranged in a higher horizontal plane than the side sills.

3. A log truck provided with a front end sill and a bolster and side sills formed integrally with said end sill and bolster, and draft beams provided with a top cover plate that is integrally connected to the front end sill and to the bolster.

4. A log truck having a cast metal frame

which comprises end and side sills integrally connected together, a bolster formed integrally with said side sills, and draft beams arranged in a higher horizontal plane than said side sills and connected to the bolster and to the front end sill.

In testimony whereof I hereunto affix my signature in the presence of two witnesses.

GUSTAV KOMAREK.

Witnesses:

SHERWOOD S. KNIGHT,
W. M. G. BRIDGEMAN.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

d side sills integrally connected together, a bolster integrally connected with said side sills, and draft beams arranged in a higher horizontal plane than said side sills and connected to the bolster and to the front end sill.

provided with a front end sill and bolster, and connected with a top cover plate connected to the front end bolster.

having a cast metal frame

which comprises end and side sills integrally connected together, a bolster formed integral with said side sills, and draft beams arranged in a higher horizontal plane than said side sills and connected to the bolster and to the front end sill. 15

In testimony whereof I hereunto affix my signature in the presence of two witnesses. 20

GUSTAV KOMAREK.

Witnesses:

SHERWOOD S. KNIGHT,

WM. G. BRIDGEMAN.

may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

Testimony of Ira L. Withrow.

Counsel for the plaintiffs objected to the introduction of these patents on the ground that they do not touch the question in issue, but are intended to show differently constructed truck frames, and do not disclose or suggest the idea involved in this invention. The objection was overruled.

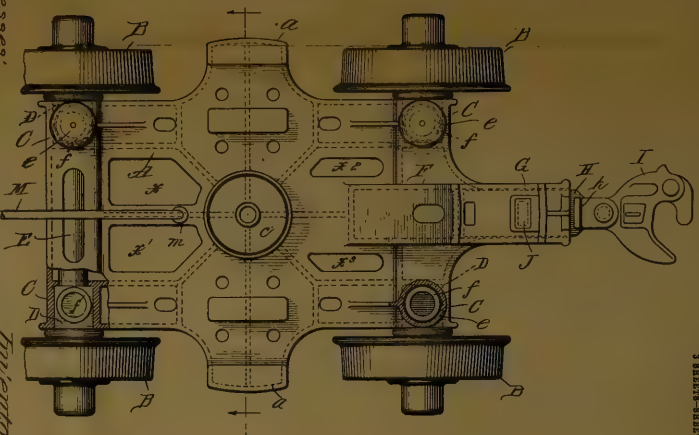
Defendants then offered in evidence a certified copy of patent No. 1,032,348, issued to William P. Bettendorf for a car truck. Counsel for plaintiffs objected to said offer on the grounds indicated above, and for the reason that inner draw-bars are not shown. The objection was overruled and the certified copy was received in evidence, and marked "Defendants' Exhibit D," and omitting the certificate, is as follows:

1,032,348.

W. P. BETTENDORF, DEC'D.
J. W. BETTENDORF, ADMINISTRATOR.
RAILWAY CAR TRUCK.
APPLICATION FILED MAR. 6, 1910.

Patented July 9, 1912.
3 SHEETS—SHEET 1.

Fig. 1

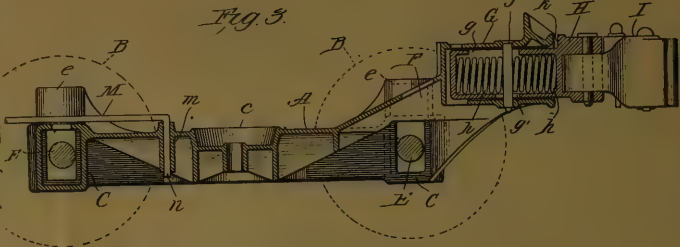
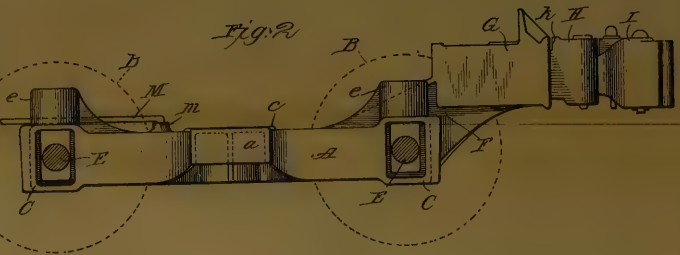


Witnesses:
Edward S. Gaudin, William P. Bettendorf,
Attorneys by David H. Thompson

1,032,348.

W. P. BETTENDORF, DEC'D.
J. W. BETTENDORF, ADMINISTRATOR.
RAILWAY CAR TRUCK.
APPLICATION FILED MAR. 6, 1910.

Patented July 9, 1912.
3 SHEETS-SHEET 1.



Witnesses:
Henry S. Baister, William P. Bettendorf
Attorneys.
by Saunders, Plummer & Co.,
attys.

1,032,348.

W. P. BETTENDORF, DEC'D.
J. W. BETTENDORF, ADMINISTRATOR.
RAILWAY CAR TRUCK.
APPLICATION FILED MAR. 6, 1910.

Patented July 9, 1912
3 SHEETS—SHEET 3.

Fig. 4.

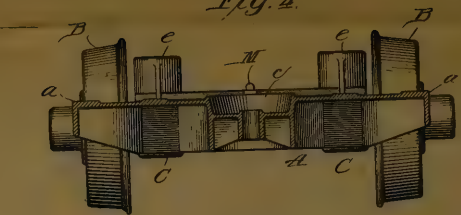
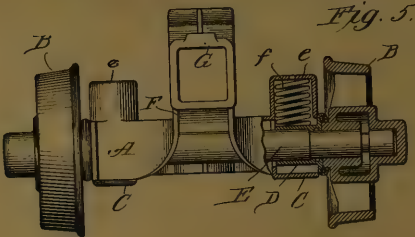


Fig. 5.



Inventor: Wm. P. Bettendorf
Atty: Howard Chandler
Wm. P. Bettendorf
Howard Chandler

UNITED STATES PATENT OFFICE.

WILLIAM P. BETTENDOFF, OF BETTENDOFF, IOWA, J. W. BETTENDOFF ADMINISTRATOR OF SAID WILLIAM P. BETTENDOFF, DECEASED.

RAILWAY-CAR TRUCK

1,032,348.

Specification of Letters Patent.
Patented July 9, 1912.

Application filed March 5, 1910. Serial No. 647,468.

To all whom it may concern:

Be it known that I, WILLIAM P. BETTENDOFF, a citizen of the United States, residing at Bettendorf, in the county of Scott and State of Iowa, have invented new and useful Improvements in Railway-Car Trucks, of which the following is a full, clear, and exact description.

My invention relates to railway car trucks and particularly to the trucks of cars from which the body may be readily lifted, or tilted to one side or the other while supported thereby.

The object of my invention is to enable the body of the car to be thus manipulated without disconnecting or uncoupling the running gear of the remainder of the cars of the train.

Another object of my invention is to provide a truck body which combines the truck-bolster, the draft-rigging support, the journals for the wheels and the housing for the cushioning elements for said wheels in one integral casting.

These and other advantages are obtained by the means hereinafter fully described and as particularly pointed out in the claims.

In the drawings: Figure 1 is a plan view of my improved truck. Fig. 2 is a side elevation thereof. Fig. 3 is a longitudinal central section of the same. Fig. 4 is a transverse central section. Fig. 5 is a detail view showing one corner of the truck-frame in section.

In the drawings A represents a rectangular-frame which is preferably, cast in one piece of metal, and has the edges thereof flanged downward. At the center of length of each side thereof, frame A is provided with side extensions *a, a*, that enter between the wheels B, of the truck and practically serve as the ends of an integral truck-bolster portion. Generally speaking the plane of the upper surface of said frame A is the same throughout, except at its center of length and width it is provided with a sunken female central bearing *c*, and at its ends over the axle of the car-wheels is shown to be stepped to a slightly higher plane. Under each end of truck-frame A, it is provided with depending rectangular housings C, the outer sides of which are removed and adapted to receive rectangular journal-boxes D for the journals of the car axles.

The portions of these journal-boxes D, within

housings C are adapted to have a limited vertical movement, and the inner walls of said housings have vertically elongated openings therein through which the axle E extends and in which limited vertical play of the axles is accommodated. Immediately over these housings, a dome *d* is made, which is, preferably, cylindrical and is of such interior dimensions as to accommodate car-springs *f*, whose upper ends bear against the closed tops of said domes and whose lower ends extend down through openings in the top of the housings and rest upon the top of the journal-boxes D.

The forward end of the truck-frame is, at its center of width provided with a longitudinally inclined hollow standard F, which is in longitudinal alignment with the pivotal center of the truck, and terminates, at its upper end, in a longitudinally elongated draft-rigging box G into which the shank or draw-bar of the car-couplers of the train, is inserted below the plane of the body of the car. This draft-rigging box G, is rectangular and its forward open end reaches out in front of the transverse plane of the forward edge of the truck, and is reinforced by a suitable marginal bead and on top by transverse and longitudinal walls or webs to enable it to resist the bulging of the upper shoulder of the opposing car-coupler. The draw-bar H of this coupler, I, is hollow and is rectangular in cross section, and is, moreover, of a length corresponding to about the length of the interior of the draft-rigging housings. The upper part of the rear portion of this hollow draw-bar, H, is provided with a longitudinally elongated opening, *h*, which is of sufficient dimensions to enable the coil-springs *A, h*, constituting the cushioning element of the draft-rigging to be inserted therethrough. These cushions are arranged in tandem and a pin *j* is inserted between them, when the parts of the draft-rigging are properly assembled. The head of this pin is seated in a suitable counter-sunk opening in the top of the draft-rigging box, and the lower end portion thereof passes down through an aperture *g* in the bottom of the hollow draw-bar and into a suitable opening in the bottom of the draft-rigging box. Pin *j* is flattened laterally; that is, at right angles to the *z* axis of the car, and is adapted to receive an intermediate bearing support for the axle, *i*, at each end of the springs. The rear

pler may be either hinged to u , made integral with the draw-bar, and may be of any design desired. The draw-bar will, under the hugging strain have a limited cushioned movement, before the shoulder k of the coupler comes in contact with the hugging contrivances on the top of the forward end of the draft-rigging box.

At a point a suitable distance removed from the female center bearing of the truck-frame, and located diametrically opposite the draft-rigging elements, I provide said frame with a vertically disposed socket m , the principal portion of the length of which is below the plane of the upper surface of the truck-frame. This socket is adapted to receive one of the hooked or down-turned ends n , of a longitudinally disposed tier-rod M , which, as shown in the drawings, may be used to tie the two trucks of each car together.

The web of the truck-frame, its transverse central portion, and its ends are provided with symmetrically disposed openings x, x' , $2x, 2x'$, to reduce its weight, and the underside of said frame is provided with a series of symmetrically disposed downwardly projecting ribs or webs, that preferably, converge toward the center of the frame where they merge into the downwardly extending cylindrical walls of the female center-bearing. The depth of these ribs or webs, preferably, increases as they extend from the outer edges of the truck-frame to the center 35 of the same, and thus reinforce said frame on the principle of a truss, whose center is designed to directly sustain the weight of the car and its load.

What I claim as new is:—

40 1. A cast metal truck-frame for car-trucks extending from axle to axle and from wheel to wheel and having a female center bearing and internal retaining devices for the joints of said axles.

45 2. A cast metal truck-frame for car-trucks extending from axle to axle and from wheel to wheel and having integral retaining devices for the axles at each corner and inside wider in the transverse plane of the space 50 between the wheels to provide an integral truck-bolster.

3. A cast metal truck-frame for car-trucks having an integral widened truck bolster portion, and an integral draft rigging support.

55 4. A truck-frame for car-trucks having an integral widened truck bolster portion, and an integral draft-rigging support.

5. A cast metal truck-frame having a 60 widened truck bolster portion, a female central bearing midway the length of said bolster portion, and an integral draft rigging support.

6. A cast metal truck-frame having a 65 widened truck bolster portion, a female cen-

tral bearing midway the length of said bolster portion, and a forwardly inclined integral standard.

7. A truck-frame for car-trucks extending in a horizontal plane from axle to axle between the wheels, having the upper portions of its ends constructed to receive and permit limited vertical play of the journal boxes of the wheels, having domes over said journal boxes to receive the cushioning springs; and 75 having a widened central bolster portion.

8. A truck-frame for car-trucks extending in a horizontal plane from axle to axle between the wheels, having the upper portions of its ends constructed to receive and permit limited vertical play of the journal boxes of the wheels, having domes over said journal boxes to receive the cushioning springs; and 80 having an integral draft-rigging support.

9. A truck-frame for car-trucks extending from axle to axle, having the under portions of its ends constructed to receive and permit limited vertical play of the journal boxes of the wheels, having domes over said journal boxes to receive the cushioning springs, hav- 85 ing a widened central bolster portion, and having an integral draft rigging support.

10. A car-truck comprising a cast metal truck-frame extending from axle to axle and from wheel to wheel having an integral central alignment with the pivot thereof, and a connecting rod for connecting one car truck of a car to another, the ends of which are bent downward and adapted to enter 90 said opening.

11. A cast metal truck-frame for car trucks extending from axle to axle and from wheel to wheel and a connecting rod one end of which is adapted to be attached to said truck frame at a point to the rear of and in longitudinal alignment with its pivot.

12. A cast metal car-truck comprising a suitable horizontally disposed truck-frame arranged between the wheels and provided with a center-bearing, a standard arising therefrom near the forward end of said 95 frame, and a draft-rigging box supported thereby.

13. A car-truck comprising a horizontally disposed truck-frame arranged between the wheels and provided with a center-bearing, a standard arising from the forward end of said frame, draft rigging supported thereby consisting of a coupler having a hollow 100 draw-bar, and cushioning devices arranged within the same.

14. A horizontally disposed cast metal truck frame for car-trucks extending from axle to axle between the wheels, having the under portions of its ends so constructed as to receive and permit limited vertical play of the journal boxes of the wheels and hav- 105 ing integral domes over said journalboxes extending above the upper surface of the

truck-frame to receive the cushioning springs.

15. A cast steel truck-frame for car-trucks extending from axle to axle between the wheels and having an integral cored out neck arising, substantially, from the center of width of its forward part, and a draft-rigging box supported thereby.

16. A car-truck comprising a suitable horizontally disposed truck-frame arranged between the wheels and provided with a center-bearing, a standard arising from the forward end of said frame, a draft-rigging box supported thereby, and a coupler having a

hollow draw-bar and having elongated openings in the top and bottom walls thereof, tandem springs within said hollow draw-bar, and a pin inserted through said elongated openings between said springs and having its ends secured in said draft-rigging.

In witness whereof I have hereunto set my hand this 28th day of February 1910.

WILLIAM P. BETTENDORF.

Witnesses:

F. R. FARRER,
F. M. GOODMAN.

Copies of this patent may be obtained for five cents each, by addressing the "Comptroller of Patents,

Washington, D. C."

Testimony of F. W. Chriswell.

F. W. Chriswell called as a witness on behalf of the defendants, and being duly sworn, testified as follows:

I live at Seattle and am engineer for the Seattle Car and Foundry Company. Have been in that position about nine and one-half years; my duties are designing trucks and estimating and looking after any complaint; I am the chief mechanical representative of the Seattle Car and Foundry Company, which is engaged in the manufacture of railway equipment, particularly of railway equipment, freight equipment and logging equipment particularly; my company constructed for the Columbia and Nehalem Railroad twenty logging trucks having one draw-bar higher than the other; the circumstances under which the idea of this method of constructing logging trucks for the handling of long logs was first suggested to me was this: March 16, 1914, I was at the camp of the Clark & Wilson Company with Mr. Vachon and Mr. W. W. Clark. We met Mr. Withrow there and they had various trucks in service, the Northwestern, our trucks and the Russell trucks, and we were discussing the merits of the trucks and Mr. Withrow called attention to the fact that the sagging of the logs interfered with the coupling, and said in order to make them serviceable for hauling long logs the inner draw-bar would have to be lowered; he offered no suggestion how it could be done, just said it should be lowered, asked me if it could be done and I told him it could; Mr. Withrow and Mr. Clark were present at that time and we had the order at that time for additional

Testimony of F. W. Chriswell.

trucks and he asked if it was possible to make the change; I said it involved changing the patterns and would delay things to make this change at this time, as the patterns were all made and the order sent forward; we didn't wish to make any change at that time so there was no further objection raised; it came out in the discussion that it would mean a change of patterns to make this change in the trucks; this question of the high and low draw-bars next arose when Mr. Kerry was in the market for trucks and our General Manager was down there at Mr. Kerry's camp; when he returned he told me that we would have to build Mr. Kerry's trucks in that way; I explained to him at the same time that this sample truck—it would be difficult to make the change at that time; it would involve pattern changes and would make a delay in delivering the truck so he said he would furnish the trucks just as they are, and if we get the order then we can make the change; we commenced to draw our plans and make our patterns and get ready to manufacture these trucks of the type we subsequently mentioned to Mr. Kerry right after we had the order from Mr. Kerry; we took the order on February 9, 1915, and we started to make the change at that time, but previous to that we had mentally to lay out a change for our other type of truck; we had designed one out for that; I mean the type of truck Clark & Wilson had; we were going to anticipate that trouble by having our patterns changed—at least we were discussing it; I can not say positively the date when we made this plan for a modification of the type of truck that Clark & Wilson used,

Testimony of F. W. Chriswell.

but it was before February, 1914, because the man that made them left Seattle and went to Europe, and he made those drawings sometime between our discussion with Clark & Wilson and the time he left; I mean February, 1915, between March, 1914, and February, 1915; Mr. Kerry gave us this order on the 9th of February, 1915, and we proceeded immediately to manufacture the cars; the claim of Mr. Chandler to a patent on this idea was first called to my attention after the patent was granted; Mr. Vachon sent me a clipping from a paper where it was announced that a patent had been granted Mr. Chandler; at that time we had manufactured these twenty trucks for Mr. Kerry's Company, but they were not delivered; I mean the trucks with the high and low draw-bar; between the time we commenced manufacturing these trucks and the time that I learned of the application of Mr. Chandler for a patent I was out at the plant of the Northwestern Equipment Company and met Mr. O'Brien, their superintendent; I believe this was in the early part of April; they were building Mr. Kerry's trucks at that time, and Mr. O'Brien asked me "Are your trucks just like these?" I said, "Virtually the same. There may be a few details, but in type they are the same thing as your trucks." We were referring then to the trucks with high and low draw-bars; he did not at that time inform me that Mr. Chandler, or his Company, made any exclusive claim to the right to manufacture such trucks; he didn't mention it; he did not mention any application for a patent; I had a conversation with Mr. Chandler himself while we were manufac-

Testimony of F. W. Chriswell.

turing these trucks and before he notified me of his application for a patent; Mr. Chandler was in our office with two of the Twohys, and we discussed the trucks and the price, but nothing was said during the conversation about patent or anything of that kind then; this was in our office at Seattle; we didn't show them the kind of trucks we were making; I can't say positively whether or not I showed him the drawing, but I don't suppose I did; I don't know that anything was mentioned regarding the high and low draw-bar; I can not say positively whether Mr. Chandler knew at that time that we were making trucks with high and low draw-bar, only the fact that he knew they were similar.

Court: "You didn't intend then to divulge to him that you were making such trucks?"

It was not that we didn't wish to divulge to him that we were making these trucks, but simply it didn't occur to us that there was anything patentable in the idea, or that there was any question about that; it was common practice to make cars with high and low draw-bars; we had built several of them ourselves and it never entered our head that such an idea was patentable; this was long after Mr. Kerry gave us the order for these twenty trucks; it was specified when the order was taken that they should have high and low draw-bars; I believe this was in April, 1915; and the order had been given in February; on that visit Mr. Chandler made no mention to me of any application for a patent; the first I learned that he claimed this idea belonged to him was at the time

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the patent was issued; if I am not mistaken, it was sometime in May; I have the letter in my files; Mr. Chandler then made that claim announcing that the patent had been granted; I have been engaged in the construction of logging trucks, car trucks and cars about twenty-three years; we had built a number of cars for different logging concerns where they wished to couple the low trucks having couplers about twenty-six inches from the rail with those 34½ inches high; we built them for the Marysville & Northern, Marysville & Arlington, the Field Timber Company and one or two other concerns where one end of the car was built stereotype, and the other end with the coupler lower to couple with low trucks; we built these cars along in April and May, 1910; all of these trucks were built so they could raise and lower the draw-heads; but they were built that way in order to facilitate shipping; we shipped them out on their own wheels, and in order for them to move on their own wheels they had to have both ends standard height; then a coupler on one end was dropped after they were received; the skeleton logging trucks were of the same type with the adjustable draw-bars; we built one of those for the Marysville & Northern with a standard height coupler; on that truck both ends were raised so that we could drop either pin, but they wanted it so they could couple their locomotive and train with the low trucks which they had, and we built that car with the draw-bars so they could drop them at either end; that was in April, 1910, if I am not mistaken; we built a car for the Hammond Lumber Company in a similar way;

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that was a flat-car built with the draw-bars arranged to drop at one end for the purpose of coupling a standard locomotive with the low logging equipment; it is a common practice in passenger-car trucks to build the frames on the two ends of different heights; it is especially necessary in passenger-cars with the bellying sill, what they call the fish bellying sill; the body of the car would interfere with the inner end of the truck frame, consequently they offset that frame, lowering the inner end of the frame; there is no draw-bar usually attached to the frame, though there is one truck or car, a street-car used in New York City known as the hobble skirt car built in 1910 when the narrow skirts were in use; to get a very low car they built the truck with the forward end projecting out past the end of the car with a draw-bar located on the truck; it was not standard height, but it was higher than the inner end. The inner end was dropped down to clear the inner end of the car; that was a matter within my own observation; I believe you will find nearly all locomotive tenders with high draw-bars next to the engine and low where it couples with the train, that is to clear the fire-box, and one thing and another on the tender; nearly all tenders, I believe, have high and low draw-bars; in the case of six wheeled trucks under heavy equipment steel cars the trucks are built with a low frame at one end to clear the fish belly sill.

The attention of the witness was then called to certain illustrations in the Master Car Builders' Associa-

Testimony of F. W. Chriswell.

tion, Car Builders' Dictionary of the 1912 Edition, and the witness testified that this is a standard work in common use by car-builders, used by nearly all car-builders a standard reference work and recognized as a standard reference book. The attention of the witness was called to a truck illustrated on page 562 and page 339, and the witness proceeded and testified as follows:

This truck is a six wheeled truck for a steel flat-car, the sills belly down here just as the logs would belly down; the frame of the truck is outside of the wheel the same as on a logging truck; this end does not interfere; Figure 348 is the truck which is used under that car; this line (indicating a line on said drawing) indicates the dropping of that frame; the frame of the truck is not shown on the figure; the drawing shows the frame of the car bottom coming up at an angle, and the end frame is dropped down while the other end is up at the position shown by the two end sills; on the high end it is up at the axle line; the frame of the truck comes above the axle line, say two or two and one-half inches; upon the end where the body bellies down the frame is dropped down to the bottom of the axle line so there is probably six or seven or eight inches difference on the frame to clear the belly of the sill; there is no draw-bar on the truck; the draw-bars are located on the car body itself, and are of the same height at the two ends of the car; there are no draw-bars on the truck itself.

Testimony of F. W. Chriswell.

Thereupon the two pages of said book, No. 562 and 339, were received in evidence and marked "Defendant's Exhibit E."

The witness proceeded and testified that it is customary in most kinds of cars having false bodies to attach the draw-bar to the body of the car rather than to the truck, but in the hobble skirt car which had been mentioned before the draw-bar was attached to the truck because the truck projects out past the body of the car, nearly half of its distance; in the case of a logging truck there is no mode of construction feasible except to attach the draw-head to the truck itself, and it is the universal practice so to attach the draw-head; in the Komarek patent, which has a draw-bar high at one end and the frame lower at the other, the only feasible way if they were coupled together would be to attach the coupler to the frame which is lower; in a logging truck the lowering of the frame at one end would necessarily result in the lowering of the draw-head at the same end; no other mode of construction would be possible; from my experience as an engineer and my knowledge of the construction of logging trucks the evident method of overcoming the difficulty which Mr. Withrow and Mr. Kerry encountered in the handling of long logs would be the one Mr. Withrow suggested; the interference was with the draw-bar, and the first thought would be, when you have a car of standard height, to overcome this by dropping the top of the draw-bar; that is self evident; it is the self evident result of the problem presented.

Testimony of F. W. Chriswell.

On cross examination the witness testified that the cars he had mentioned which they constructed in 1910 were flat-cars, and one was a logging connected truck connected by continuous timbers; they were cars made up in permanent forms with trucks at the opposite ends which were connected together by the bodies of the cars; some of those cars were made with adjustable bars or draw-heads in order that they may be raised and lowered at both ends; the purpose of that was in order that they might be shipped on their own wheels so that the cars could be adjusted for connection with standard equipment for shipment on their own wheels, and when they were used with logging trains where the equipment was low the draw-bars could be lowered; in these cars there was no coupling or draw-heads on the inner ends of the trucks; they were connected by the beams or by the body of the flat-car; in the hobble skirt car there was no coupling or draw-head on the inner ends of the trucks; they were also connected by the body of the car; in all of these cars referred to in the dictionary the construction is the same, the trucks being connected by the bodies of the cars; the draw-heads are placed centrally of the car, longitudinally but not transversely. The line of pull would come underneath the bunk which carries the log; it must come that way in any case; it would be possible to attach a draw-bar directly to the frame which comes around one the inside without coupling it back into the middle of the truck, and this is sometimes done; the only thing is that it makes the stress through the side frame instead of through the center, and it would not make any differ-

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ence so far as tipping is concerned; if the inner end of the truck frame was considerable lower and the strain was applied directly to it tipping would be caused if the pull was up, but the pull is not up; the pull would be in a line with the draft timber; we have never built disconnected logging trucks with the high draw-bar at one end and the low draw-bar at the other until Mr. Kerry was in the market for them; that idea was first brought to my attention when I was down at Clark & Wilson's camp on March 16, 1914; in talking with Mr. Withrow he called attention to the interference of the coupler, and he said that the way out of it was to lower the coupler; I did not immediately make any drawings or sketches, or take any steps to build a truck of that kind; when I returned to the shop I discussed it with the drafting department and told them at their convenience to work out the truck that Clark & Wilson had with this idea, so that in case there was a repeat order we would have it in shape; the truck Clark & Wilson had was an all steel frame truck with both draw-bars of standard height; between the time I was in Clark & Wilson's camp and the time that Mr. Olsen, our chief draughtsman, went to Europe, he worked out a design for truck having a draw-bar at one end higher than at the other; we got a request to furnish Mr. Kerry sample trucks in November, 1914, and furnished him trucks; they did not have the high and low draw-bar; I didn't see Mr. Kerry myself, but our general manager told me he spoke to Mr. Kerry about constructing a truck with the high and low draw-bar; it was not a common practice, and I

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didn't wish to introduce anything that was out of the ordinary in the line of construction; we wanted to avoid multiplicity of designs and patterns as much as we could. It was a departure; I didn't have any conversation with Mr. Kerry; Mr. Kerry informed us that he could get these trucks from the Northwestern Equipment Company with high and low draw-bars; at that time the sample trucks had already been furnished; I had seen them and thought they were a practical truck well designed for taking care of long logs, and in order to get the order we told Mr. Kerry that we could build him the same kind of truck; I could see nothing patentable about it; the patent office states there is nothing patentable about the different heights of draw-bars; we furnished twenty logging trucks to Mr. Kerry with the high and low draw-bars; Mr. Withrow discussed with me the question of building these logging trucks with high and low draw-bars; I am absolutely positive that he suggested to me the idea of lowering the inner draw-bar; to a reasonable extent the difficulty can be overcome by raising the log bunk, but where the landings are built it is not practicable; in the truck construction it would be easier to raise the log bunk than to reconstruct the design of the truck frame so as to lower the draw bar, but where landings are built requiring certain heights of bunks this might in some cases mean reconstruction of the landings; in our trucks it would not be any easier because they are all steel and you could not raise the bunk in that case without changing the design of the truck; our first endeavor to produce a logging truck with the high and low

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draw-bar was after we knew of Mr. Kerry's order, and then we worked out drawings and built the trucks for the first time; I won't say we built those for the first time; we built some trucks in the meantime, or rebuilt some where we just placed another set of draft timbers on top; we had some low trucks in our shop and the Everett Interurban wanted some trucks to use on their line, and they had to be coupled standard height, so I took it up with their mechanical department and suggested that we just raise one end instead of the two ends and that this was the easiest way out of it; that to raise one end would be cheaper, cost them about half as much as to raise the whole truck; so we just put on wooden drafting around one end and raised the coupler and coupled with the standard equipment, leaving the others down in their present position; this was a detached logging car; that was not to avoid the log; the timber referred to is what we call the draft timber to which the coupler is attached; there are two timbers running lengthways and the draft rod or coupler is placed between them; all we did was to bolt on some short pieces at one end and take the coupler out of its position and raise it up so that it would couple with standard equipment under the Interstate Commerce requirements; that truck was for hauling logs on the Seattle & Everett Interurban; there were eight or ten sets, and we changed all of them just changing one end; it was not necessary to change the other end and was cheaper to change one end; they wanted to comply with the Interstate Commerce requirements so we just raised the couplings on

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one end so they could couple; these trucks are still in existence; they are still on the Everett Interurban; these couplers were not raised for the purpose of avoiding the logs, but just simply to comply with the Interstate Commerce requirements; we could do that by raising one end to couple the car with other standard equipment; what is between does not make any difference; they use those trucks in pairs in the same manner that these are used; they had draw-bars on their inner ends twenty-six inches high to the center; we raised the couplers on these cars to thirty-four inches; we raised them eight inches; that, was in February, 1915; the other cars we built in 1910 were flat-cars or connected trucks; they were using both flat-cars and connected trucks; we had furnished them with low trucks, and they wanted to use air-brakes on their trains as they could not get enough power on the hand brakes and they wanted to put in some flat-cars, but the flat-cars had to be standard height, consequently they wanted one end lower to connect with their logging trucks; that is why they lowered them; I discussed with Mr. Withrow this matter of making trucks with high and low draw-bar; we discussed the fact of its being possible to do this, not by reconstructing the trucks we had, but on new equipment; I explained that the patterns would have to be changed on the trucks that were under consideration at that time; it could be done by changing the patterns; at the time this was first brought up the order had been placed in an eastern factory for the castings; in our case the truck is all made of cast steel; the trucks we furnished Mr. Kerry are very similar to those

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of the Northwestern Equipment Company, but the ones we furnished Clark & Wilson are quite different; they are cast steel; this is built up of steel bars while the bunks we furnished Clark & Wilson was steel frame, in one piece; they didn't have the high and low draw-bars; we never furnished the high and low draw-bar to anybody but Mr. Kerry and on the cars we reconstructed for the Interurban.

A. S. Kerry being called as a witness on behalf of defendants and duly sworn, testified as follows:

I reside at Kerry, Oeragon; am engaged in railroading and logging, and am President and Manager of the defendant Columbia and Nehalem River railroad, and one of the defendants in this suit; I cannot remember exactly when this idea of the construction of a detached logging truck with one draw-bar higher than the other was first suggested to me; I think it was sometime in the Fall of 1914; my first intimation came to me, I think, from Mr. Clark; I am not positive about that; I mean Mr. Clark, of Clark & Wilson; I was casting around for logging trucks and made inquiry from Mr. Chandler, of the Northwestern Equipment Company, and Mr. Piggott, of the Seattle Car and Foundry Company, and Mr. Brown, of the Russell Car & Foundry Company; I first made verbal inquiry. The representatives of those companies visited me sometime before I made a written request for specifications and sample car; I think it was in September or October, 1914, that I received the first car.

Testimony of A. S. Kerry.

and I think the inquiry was sent in November, the latter part of October or the first of November; two or three months before that I received a stock car from the Russell Car & Foundry Company which was built for a lumber company in Washington, and they wanted me to try it out; we were not logging then, but I could easily see there was about seven inches of clearance within the inside draw-head and the top of the bunk which would not admit of our hauling long logs, and I saw that we must have something that would connect with the main line equipment and at the same time handle our logs; I think that the suggestion came to me first from Mr. Clark in a conversation about the cars that we had received from Mr. Chandler; I told him that I was in the market for cars and would like to have him tell me what his experience was, and he told me there was one difficulty about the cars he received from Mr. Chandler, that they would not stay on a logging railroad, they jumped the track, and he said, "I particularly caution you about having the draw-bars too high. We have trouble on our road. Logs catch the draw-head and cause derailment, not only with Mr. Chandler's car, but with every car we have—Russell's, Seattle and Mr. Chandler's." I would not be positive about Mr. Clark having said to me that I should have the inner draw-bar lowered at that time, but I am under the impression that he did; that was in the Fall of 1914; in sending out my written inquiries I did not specify the high and low draw-bars; I talked to each of their representatives individually, then I sent out the

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inquiry to Mr. Chandler and the Seattle Car Company and the Russell Company, asking the Russell Company to give me a price on the car that they had furnished, and submit to me some sort of a plan of a car with the lower draw-head. I sent that inquiry out in November, I think, 1914; then I had conversations at various times with the representatives of these companies; the sample cars came, and the representative of the Seattle Car Company called on me; I hadn't yet seen the car; I asked him the height of the bunk over the inner draw-head, and they gave me 11 inches; as a matter of fact it was only about 7 or $7\frac{1}{2}$; Mr. Chandler's car came and it was just exactly what we wanted; the inside draw-head was sufficiently low to haul these long logs, and the outer draw-head was standard to connect with standard coupling; this was the sample set of trucks furnished by Mr. Chandler received about the same time that I received one from Seattle; I think Mr. Chandler's came a little ahead of the Seattle truck. The Seattle car had both draw-heads the same height, and the Chandler car had one low and one high; this was probably in February, perhaps in January, 1915; it was sometime after that, probably in February, that I gave the order for the forty cars; in placing the order for those trucks I visited the shops of the Seattle Car Company in Seattle, and they had on hand forty second-hand cars, and I looked them over and practically agreed to buy them, but didn't sign a contract; Mr. Piggott was going to draw up a contract and send it; they were constructed with a great deal higher bunk; the draw-heads were the

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same height, but they were a much higher bunk, and they were a shorter car; shortening the pull of the car, the draw-head, would have the same effect as either raising the bunk or lowering the draw-head, because the deflection would not hit the draw-head if the car was short; one timber company's cars are very short and have draw-heads the same height, and they can draw as long a log as we can without having to interfere with the draw-head. I practically gave the order to Mr. Piggot, and he was to draw up the contract, but I didn't receive the contract for some little time, and the more I thought about the equipment the more I was convinced that it was not what I wanted; I already had prices from each of these concerns for a 100,000 capacity car; the sample car we received from the Russell Company was a 60,000 capacity car; Mr. Chandler happened on the scene some days after I had talked the matter over with Mr. Piggot and agreed to sign the contract when he sent it; he made me a quotation on a 60,000 capacity car; the price was so attractive that I made up my mind that I would take the new stuff and discard the old; the original bid these three different concerns made was for a 100,000 capacity and not for 60; Mr. Chandler talked to me, and I practically gave him the order; he was to consult with his superiors and let me know in a day or two, but just before leaving the office he said, "We will furnish them, I am sure of that." That order was for cars with one draw-head low and the other high, new 60,000 capacity cars; within forty-eight hours afterwards the Seattle Car Company's representatives called on me and insisted they had not

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been given a fair deal because they had not had an opportunity to bid on a 60,000 capacity car, and they didn't think, in justice to them, we should award the contract to Mr. Chandler, that they should at least have half of the cars, and they made me a price that was still a little better than the price that was made by Mr. Chandler, and I divided the order. I telegraphed Mr. Chandler and told him, under the circumstances I thought it was my duty to divide the order; I gave Mr. Chandler one-half of the order and the other half to the Seattle Company; they were to construct their cars with a low draw-head on the inside; I tried to call Mr. Chandler by long distance the next day and found he was in Seattle, and I left word at his office, and the next day took the train and came to Portland to find him; about two days elapsed before I saw him; I gave my first order about the 9th and talked with him personally here in Portland about the 11th; it may have been three days, but not more than that, and I think it was the very next day that I called up his office, and then the next morning took the train and came to Portland and saw him; I told him I had decided to give the Seattle Car & Foundry Company half the order for these forty trucks; I would not say positively that Mr. Chandler didn't tell me at that time that he could claim the exclusive right to make trucks of that type, but I have no recollection of his telling me that. I do not remember that he said anything at that time as to having a patent or claiming a patent right, or having applied for a patent; I could not give you the date when he first notified me that he claimed the exclu-

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sive patent right to this type of cars, but he notified me that he was going to sue us on account of the infringement of his patent by the Seattle Car & Foundry Company—that he had taken a patent on that car—and I immediately got a bond from the Seattle Car Company to protect me in these patent rights; also from Mr. Chandler; I could not tell without looking up my records how long this was after I gave the order.

Upon cross-examination the witness was shown the letter marked “Complainant’s Exhibit 2,” and testified as follows:

“That letter is similar to the ones which I sent these three different Companies, notifying them that I was in the market for cars; practically the same was sent to all of them—I think exactly the same. I can not remember when Mr. Chandler wrote me in reply to this letter that he could furnish a logging truck with high and low draw-bars, but I think he told me because Mr. Chandler was very resourceful in things of that kind. He was giving information all the time; we had several conversations about it; I am quite sure that I received the letter of which Complainant’s Exhibit 3 is a carbon copy, and in reply I wrote the letter marked “Complainat’s Exhibit 4”; I do not think that this letter was the first time the idea of a logging truck having a high draw-bar at one end and a low draw-bar at the other was brought to my attention; he says “They (Clark & Wilson) told us that if they ordered any more trucks they would want us to furnish them a truck having the outside couplers of

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standard height and the inside couplers ten inches lower.” That is practically what Mr. Clark told me, that he would have the inside couplers made lower, and would have the axle journals more flexible so they would follow the curve around; Mr. Clark did not say anything how the idea of a high and low draw-bar was brought to his attention; he did not connect Mr. Chandler in any way with any trucks they had except to say that the Seattle cars stayed on the track better. The question of the high and low draw-bar was not discussed at that time only in that advice to me to get a low draw-bar car—I would have difficulty if I didn’t; I think I mentioned to all of these gentlemen that the trucks would have to give a certain clearance, and they were figuring on eleven inches of clearance, and I expected to leave that to their ingenuity as to how they would arrive at it. I was figuring on this clearance between the top of the log bunk and the couplers. Our outer coupling had to be standard height and the point I had in mind was a certain distance between the top of the bunk and the coupler to be given either by raising the bunk or lowering the draw-head, or any way they had in mind to figure it out; I don’t remember all my conversation with the different companies, but I think probably I discussed that point with most of them; any way, I am sure I discussed it after Mr. Chandler and myself talked it over; Mr. Chandler was the first to definitely bring to my attention a plan of that kind, and he told me they could work it out and make a success of it; that was the sample he furnished me, and it was very satisfactory; the samples fur-

Testimony of A. S. Kerry.

nished by other companies were of standard height; the Russell Company did not have an opportunity to furnish me a high and low draw-bar; they brought one down there and tried to reconstruct that one, but could not; but we already had their car before they had an opportunity; they never furnished a real sample on this inquiry of mine; the car they furnished had both draw-bars at the same height; I think the price per set at which Mr. Chandler offered to furnish his trucks was \$725, for the pair of trucks; I think \$625 was the price made by the Seattle Company; I divided the order and gave the Seattle Company an order for twenty trucks and Mr. Chandler an order for twenty; the Seattle Company furnished me twenty-sets of trucks similar to the ones furnished by Mr. Chandler, and I am using them and they are all satisfactory; before that I had never seen or heard of any logging trucks of that kind; I was in the logging business about thirty years; it was quite a radical departure from anything of the kind made before; it was quite a difficult problem always to haul long logs without having them to interfere, and we had lots of difficulty; going around the curve the draw-bar would hit the logs and tip the car over or throw it off the track; these trucks with a high and low draw-bar was a very clever solution of the problem. I don't know how we would get along without it in the present system of logging; the short trucks that I spoke of awhile ago would be all right; the center of gravity would be a little higher; they raised their bunk a little bit higher than these bunks; that would not be so serious an objection; of course, they would not

Testimony of A. S. Kerry.

be as good a car as this short car; I am not sure a steel car could be constructed as short as a car made of wood. The Benson Timber Company's cars are made of wood and iron and I doubt very much whether these steel and iron cars that we have would be a success made as short as the other car. The trucks ordered from the Seattle Car Company were not identical with the trucks mentioned by Chandler; I merely specified that they must have a low inside and high outside draw-head, and the same capacity and weight of wheels; they specified a steel bunk and Mr. Chandler specified a built up bunk; there is a great deal of difference between the cars—the frame is different; the Seattle truck is just as satisfactory as the Chandler truck with one or two exceptions; the bunk on the Seattle truck was not heavy enough to stand the heavy loads we put on the cars, and it sprung; and the rub irons on the Seattle truck were not long enough for our curvature, and the bunk would not ride on the rub irons making a very heavy curve, 30 degrees curve. Unless it was laid absolutely it would get off the rub irons, cause derailment. Those two features are the only ones that make the cars any different as far as volume of service is concerned; the particular feature which we wished in both logging trucks was the high draw-bar and the low draw-bar; we simply had to have it or we could not log the way we were going to log; we would either have to use a separate draw-bar, what we called raisers, to connect with foreign equipment, or we would have to have the high draw-head on the outside, otherwise our equipment would not connect with the S. P. & S. equip-

Testimony of A. S. Kerry.

ment; I don't think I ever suggested the idea of this high and low draw-bar before Mr. Chandler suggested it to me; that letter will indicate that I didn't, although I may have asked Mr. Clark; Chandler told me about Clark & Wilsons' difficulty in a conversation I had, and it may have been the results of our conversation that he wrote that letter. If Mr. Chandler said he told me that he had brought out the high and low draw-bar as a solution of difficulties which Clark & Wilson were having, I would believe it. I don't remember.

Upon redirect examination the witness testified that it would be feasible to handle his long logs with a truck having a sufficiently high bunk and both draw-bars low if it were not for the necessity of connecting with outside equipment; that if they had only the problem of the long logs to solve they could solve it as well with trucks having draw-bars low so that the necessity for one draw-bar high and the other low arises out of the necessity of coupling with other equipment rather than out of the problem of handling long logs.

Upon recross examination the witness testified that if he did not have one high draw-bar and one low he would be put to a great deal of inconvenience in hauling these logging trucks with standard equipment; that his road is a common carrier road and will do a lot of business besides logging business; that an ordinary logging road would not need the high and low draw-head because there is some little objection to it; that if the two cars forming a set get separated they must come together;

Testimony of E. V. Vachon.

you can not take the half of one car and use it with the same half of another car, and, as a result, you occasionally have two cars laid up when you might have one if they were all low; if the draw-heads were all the same you could switch them around and use one-half of the car with half of another, while with the different heights of draw-bars all the cars must be together—each is a pair and inseparable. If we wanted to, we could couple a pair between every other flat car or every other box car or every other passenger car, of standard equipment.

E. V. Vachon being called as a witness on behalf of defendants and duly sworn, testified as follows:

I reside in Portland, and am the representative of the Seattle Car & Foundry Company here as salesman; have been in Portland two and one-half years, and have been salesman for that Company for three or four years; I remember an occasion when this question of the interference of long logs with the inside draw-bars of detached trucks and the mode of overcoming that objection was discussed by Mr. Chriswell and Mr. Withrow in my presence; I don't remember the exact date, but it was in the early part of 1914, and we were at the camps of the Clark & Wilson Lumber Company, Mr. Withrow being the superintendent, and were talking with him about the difficulties experienced with long logs in the clearance of the inside equipments; I don't remember just the conversation, but the substance of it was that some arrangement should be made to provide for that, and the

Testimony of E. V. Vachon.

practical way seemed to be to lower the couplers on the inside so that they would not interfere, causing accidents or anything of that kind.

On cross examination the witness testified as follows:

Mr. Withrow suggested that this lowering of the couplers on the inside was the practical way; I do not remember his exact words; it was just to the effect that the coupler should be lowered at the inside to take care of that; he thought that was the practical way of obviating the difficulty; this was in the early part of 1914; he did not suggest any way of doing it, he didn't go into the technical part; he suggested that it might be the practical way, as I remember his suggestion—it would be the practical way, or something to that effect, I don't just remember the words; I don't think he suggested any other solution; I do not remember that he made any statement that the Northwestern Equipment Company could build that kind of a car; I have called at their camps at different intervals, and I think the point has been discussed on more than one occasion and even as late as last summer; I have called on Mr. Kerry a number of times about their requirements, and called on him before he sent out this notice that he was in the market for trucks in November, 1914—both before and after—I don't remember calling on him that particular month; I discussed this question of the high and low draw-bar with him; I remember one instance definitely, and that was when Mr. Colvin, our General Manager, and I were at Mr. Kerry's office ne-

Testimony of Elbert G. Chandler.

gotiating for equipment, and this point was discussed generally; that was in January, I think, 1915; the point was discussed, but I don't know whether it was suggested at that time that he could have trucks of that type or not; we didn't furnish him sample trucks of that kind.

Elbert G. Chandler being recalled as a witness on behalf of the plaintiffs testified as follows:

The reason I did not apply for the patent before February 25, 1915, was that we had never worked out the mechanical details of the truck to know whether the high or low draw-bar I had was a practical one, and we had to work it out and get it into service before we went to the expense of getting out a patent; we built the sample set of trucks for Mr. Kerry; that was the experimenting that took place; we were about thirty days building that sample set; we had to change the mechanical details of the truck two or three times to get the line of draft in a satisfactory shape. For instance, one draw-bar might be so high and the other so low that when pushing the trucks they would end up—that is, the wheels next to the high draw-bar would leave the track, and it became a mechanical problem to get our line of draft as nearly as possible in a horizontal position; it required some mechanical skill to work it out. I worked it out and embodied it in the sample truck sent to Mr. Kerry; those were the first full-sized trucks embodying the idea that we built; Mr. VanCleve did not suggest to me the idea

Testimony of Elbert G. Chandler.

of the high and low draw-bar; the only report he made on the subject was that they were having difficulty and that Mr. Withrow had stated that they would want some truck that would take care of that; Mr. Van Cleve never reported to me that the low draw-bar would solve the question; he reported to me that the difficulty was that the logs struck the inner draw-bars and caused the derailment of the trucks; the first solution that occurred to us was to raise the bunk and give sufficient clearance between the top of the draw-bar and the top of the bunk itself. This had difficulties because it raised the center of gravity to such an extent that it might be dangerous on the rough track you find for logging purposes; Mr. Kerry never made any suggestion to me in regard to the high and low draw-bars; so far as I know his first knowledge in regard to this was obtained from me while we were negotiating for this order; I think he placed the order on the 5th of February; I was there on Friday and my recollection is we acknowledged receipt of the letter on Saturday, and Mr. Kerry came to Portland and cancelled the order verbally on Wednesday following; there were four or five days elapsed between the time I called on Mr. Kerry and his verbal cancellation of the order here at Portland; he said the Seattle Car Company had agreed to furnish him practically the same truck at a price of \$625.00, and that he would cancel the order with us, and if we cared to take one-half the order at that price he would let us have it, otherwise he would place the entire order with the Seattle Car Company; I advised him verbally at that time that the idea of the high and low

Testimony of Elbert G. Chandler.

draw-bar was our own; I think my exact words were that the Seattle Car Company could not build him a duplicate of the truck we sent him because the idea of a high and low draw-bar was ours; it is my recollection that I didn't threaten to sue him at that time, but afterwards advised him by letter; I suggested that he better protect himself.

On cross-examination the witness testified as follows:

The problem is to afford a greater clearance between the bunk and the draw-bar; the raising of the bunk was the first solution that occurred to me; to lower the draw-bar was not the first solution that occurred to us, because there were mechanical difficulties in the way; and it was a new departure; no one had ever, as far as I know, carried out the idea before. Next we decided that we could furnish a cast steel goose-neck with each set of trucks by which the cars could be coupled up with the standard height cars that Mr. Kerry would haul over his line; I don't recollect the exact mental process that we went through, but the final decision that came to us was that the clearance might be afforded by lowering the draw-bar; we didn't go through any experiments at all; we gave it considerable study; I don't know just the time that it took us to evolve the idea of affording a greater clearance by lowering the draw-bar; I think it was something about thirty days before I ever thought of lowering the draw-bar at all; before it ever occurred to me that that might be done; I don't claim that it was

Testimony of Elbert G. Chandler.

exactly thirty days, it was somewhere about that time; it was approximately thirty days after this problem was presented to me before it ever occurred to me that the difficulty might be overcome by lowering the draw-bar.

Upon redirect examination the witness testified as follows:

I cannot say exactly how many days it was after we found this difficulty before the idea of the high and low draw-bar suggested itself to me; but it was about thirty days before we had a practical construction which we thought would be possible to embody in a logging truck; the first we learned of this difficulty of the logs hitting the draw-bar was at Clark & Wilson's camp sometime in the early part of the year 1914, and it was somewhere about thirty days after that that I struck on the idea of lowering one of the draw-bars.

Upon recross examination the witness testified as follows:

It was somewhere about thirty days after the trouble was reported at Clark & Wilson's before the idea first occurred to me that this difficulty might be solved by lowering the draw-bars.

CERTIFICATE.

*In the District Court of the United States for the
District of Oregon.*

Elbert G. Chandler and Northwestern Equipment
company, a corporation,

Plaintiffs.

vs.

Columbia and Nehalem River R. R. Co., a corpora-
tion, and A. S. Kerry,

Defendants.

CERTIFICATE.

I hereby certify that the appellants have prepared a statement of evidence in the above entitled cause, and duly lodged the same in the office of the Clerk of this Court, and have filed therewith a stipulation by the parties hereto approving and consenting to said statement; and it appearing and being found by consent of both parties that the said statement of the evidence is true, complete and properly prepared, it is therefore **FOUND, ORDERED AND CERTIFIED** that the annexed statement of the evidence attached hereto and the exhibits therewith included be and the same are hereby made a part of the record in this cause as the statement of the evidence therein, and the same shall constitute a part of the record in said cause for the purpose of appeal.

Dated at Portland, Oregon, this 9th day of October,
1916.

CHAS. E. WOLVERTON,
District Judge.

Filed October 9, 1916. G. H. MARSH, Clerk.

And afterwards, to-wit, on the 10th day of October,
1916, there was duly filed in said Court and cause,
a Praecipe for Transcript, in words and figures as
follows, to-wit:

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above entitled Court:

Please prepare and certify, to constitute the record
on appeal in the above cause, a transcript of the follow-
ing documents, omitting endorsements, acceptances of
service, etc., the record to be printed at Portland, Ore-
gon:

1. The bill of complaint.
2. The answer.
3. The supplemental answer.
4. The statement of evidence with the order of court
settling the same.
5. The final decree.
6. The petition of the defendants for an appeal and
the order allowing the same.
7. The bond of defendants on appeal.

8. The assignment of errors.
9. The citation on appeal.
10. The praecipe.

VEAZIE, McCOURT & VEAZIE,
Attorneys for Defendants and Appellants.

Filed October 10, 1916. G. H. MARSH, Clerk.

United States of America,
District of Oregon,—ss.

I, G. H. MARSH, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal in the case in which Columbia & Nehalem River Railroad, a corporation, and A. S. Kerry are Appellants, and Elbert G. Chandler and Northwestern Equipment Company, a corporation, are Appellees, in accordance with the law and the rules of this Court, and in accordance with the praecipe of the appellants filed in said case, and that the said record is a full, true, and correct transcript of the record and proceedings had in said Court in said cause, in accordance with said praecipe, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing record is \$....., and that the same has been paid by said appellants.

In testimony whereof I hereunto set my hand and affix the seal of said Court, at Portland, in said District, on the day of, 1915.

.....
Clerk.

No. 2883

In the United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA and NEHALEM RIVER
RAILROAD COMPANY, a corpora-
tion, and A. S. KERRY,

Appellants,

vs.

ELBERT G. CHANDLER and
NORTHWESTERN EQUIPMENT
COMPANY, a corporation,

Appellees.

Appellants' Brief

VEAZIE, McCOURT & VEAZIE,

Attorneys for Appellant.

Filed this.....day of January, 1917.

F. D. Monckton, Clerk,

By **Filed**, Deputy.

JAN 29 1917

F. D. Monckton,
Clerk.

No. _____

In the United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA and NEHALEM RIVER
RAILROAD COMPANY, a corpora-
tion, and A. S. KERRY,

Appellants,

vs.

ELBERT G. CHANDLER and
NORTHWESTERN EQUIPMENT
COMPANY, a corporation,

Appellees.

STATEMENT OF FACTS.

This is a suit brought by Elbert G. Chandler and the Northwestern Equipment Company against the Columbia & Nehalem River Railroad and A. S. Kerry to restrain an alleged infringement of United States patent No. 1,140,875, issued to Chandler May 25, 1915, and to recover damages. The appeal is from a decree sustaining the validity of the patent, enjoining the appellants from using certain logging trucks manufactured

and sold to them by the Seattle Car & Foundry Company, and awarding the appellees damages in the sum of \$660.

The bill of complaint is in the usual form in such cases, alleging infringement through unwarranted use of certain logging trucks. The patent appears as Plaintiff's Exhibit "1", between pages 44 and 47 of the Transcript of Record. It relates to detached logging trucks, which are to be distinguished from ordinary flat cars, and from connected logging trucks, by the fact that in the flat cars and connected or skeleton trucks the two sets of wheels which support the car or truck are connected by the car body or a permanent framework, while in the detached trucks there is no such permanent connection, the trucks being used in pairs and held together when loaded by the logs constituting the load, and being coupled together when hauled empty. Each detached truck therefore requires a coupling apparatus at either end.

Detached logging trucks in a great variety of forms have been in common use for many years. The patentable feature claimed by Chandler is the idea of having the draw-head or coupling device lower on one end of the truck than on the other. In his specifications he recites that it is common to haul on these detached trucks logs as much as ninety feet in length, and that the weight of these long logs causes them to sag in the middle, so as to strike the inner draw-bars of the trucks, thereby causing derailments and other troubles. His claims are stated as follows:

"What I claim and desire to secure by Letters Patent is—

1. A pair of logging trucks having at their outer ends draw-bars at standard height, and having at their inner ends, draw-bars arranged below standard height, whereby to give clearance for sagging logs thereon, and at the same time being adapted to be coupled to each other, when said trucks are brought together.

2. A logging truck having a log supporting bunk thereon, and provided at one end with coupling means at substantially standard height, and at its other end with coupling means considerably below standard height, substantially as and for the purpose indicated.

3. In combination two logging trucks, each provided with log supporting means, and each having at its outer ends coupling means positioned at substantially standard height, whereby to be coupled to standard equipment, and each having at its inner end coupling means positioned below standard height, whereby to give clearance, and adapted to be coupled together.

4. A logging truck having a log bunk pivotally mounted thereupon, a draw-bar at one end mounted at standard height, and adapted to be coupled to standard railroad equipment, and a draw-bar at the opposite end of said truck below the top of the frame thereof, and below standard height, to give clearance forwardly of the log bunk, substantially as, and for the purpose described."

The appellants admit the use of certain detached logging trucks purchased from the Seattle Car & Foundry Company, having one draw-bar higher than the other, and defend on several grounds, which may be stated briefly as follows: that there is no invention or patentable novelty in the mere idea or device of lowering one draw-bar of a truck by well-known mechanical processes, and that Chandler's patent rests wholly upon that bare idea, there being no claim for any novel or peculiar method by which the result is to be accomplished; that this idea had been anticipated by numerous familiar devices and adjustments in logging equipment, railway cars, and machines and vehicles in common use, of which many examples are given in the answer and evidence; and that this idea did not originate with Chandler, and that he was not the true or original inventor, but that it was suggested and explained to him by one of his customers.

A trial on the merits resulted in the decree above mentioned.

SPECIFICATION OF ERRORS.

The errors claimed go to the entire scope of the decree, the appellants claiming that the District Court should have held the Chandler patent void for want of invention or patentable novelty, and that the other objections to its validity mentioned above should have been sustained. The errors assigned state the position of appellants more formally as follows (Transcript of Record, pp. 36 to 38):

"1. That the United States District Court for the District of Oregon erred in holding that the letters patent of the United States, granted on May 25, 1915, to the plaintiff, Elbert G. Chandler, being patent No. 1,140,875, and being the letters patent sued on herein, are good and valid in law.

2. The said Court erred in holding that the pretended improvements claimed in and by the said patent or any of them were inventions when produced by the said Elbert G. Chandler.

3. The said Court erred in holding that any of the pretended improvements claimed in or covered by the said patent was possessed of patentable novelty or included, or involved, or showed any patentable novelty or invention.

4. The said Court erred in failing to find and hold that the pretended improvements embraced in and claimed under the said patent were anticipated by the several patents set forth in the answer of the defendants and offered in evidence at the trial of this cause.

5. The said Court erred in failing to find and hold that the said pretended improvements consisted wholly of ideas, expedients and adaptations which were well and commonly known and in general public use in numerous cars, or trucks and other devices for many years prior to the alleged invention represented by the said patent.

6. The said Court erred in holding that the said Elbert G. Chandler was the original and first inventor of the alleged improvements described in said patent.

7. The said Court erred in holding that said patent is infringed by the logging trucks purchased by the defendants from the Seattle Car & Foundry Company and which are being used by the defendants.

8. The Court erred in holding and decreeing that the defendants and each of them and their agents and representatives be enjoined from any further construction, sale or use in any manner of logging trucks having the draw-head at standard height and the other draw-head substantially below standard height, and in holding and decreeing that the defendants be enjoined from the further use of the twenty sets of logging trucks so purchased from the Seattle Car & Foundry Company.

9. The said Court erred in awarding plaintiffs damages in the amount of six hundred and sixty dollars (\$660) or in any sum or the costs of the proceedings.

10. The said Court erred in failing to decree that the complaint of the plaintiffs be dismissed and in failing to award defendants judgment for their costs and disbursements."

ARGUMENT.

At the time this alleged invention was made, detached logging trucks of various types had been in common use for many years. Differing in details of construction, they had certain features which from the inherent necessities of the case were essentially similar. These were: first, a framework supported on the axles of the wheels and adapted to the carrying of heavy

loads; second, a log support or "bunk," placed at convenient height on this framework, and arranged for the holding of logs in transit, with devices for releasing the logs for unloading; third, coupling means at one end of each such truck, for the coupling of loaded pairs of trucks in trains; and fourth, coupling means at the other end of each truck, for the purpose of coupling empty trucks in trains.

It is self-evident that these detached trucks must be used in pairs or not at all, and that coupling devices must be provided at the outer ends of each co-operating pair of trucks, in order that the loaded pairs may be fastened together and to other equipment in trains, and that empty trucks must be coupled together at their inner ends by some sort of device in order that they may be hauled in trains. These are not ideas evolved or discovered by Chandler, but conditions inherent in the business, and open to the most casual observation.

It is equally plain that the problem of affording clearance between a sagging log and the inner draw-head of a truck, regarded abstractly, without reference to mechanical difficulties of construction, is to be solved according to the simplest and most obvious mathematical principles. It is a question of relative height between the log-supporting bunk and the draw-head, and distance of the draw-head from the bunk. If a sagging log strikes a draw-head which is a given distance below the bunk, and extends a given distance before or behind the bunk, the nature of the case admits of two possible solutions, as will readily be seen by anyone. The

elevation of the bunk above the draw-bar can be increased, either by raising the bunk or by lowering the draw-bar; or the draw-bar can be shortened, so that it will not extend to a point where the sagging of the log will be sufficient to reach it. These facts require neither inventive genius nor mechanical skill for their full perception and understanding.

Chandler claims that he invented or discovered the idea of affording this clearance by lowering one draw-bar of each truck, leaving the log bunk and the other draw-bar undisturbed. He admits that the desired result had been accomplished by others through the use of higher bunks, or of lower draw-bars at both ends of the truck, or shorter draw-bars, but claims invention and patentable novelty for the idea of lowering only one draw-bar of each truck. It is important to observe that he makes no claim to any particular method by which this lowering is to be accomplished, nor to any readjustment of other parts or special mode of construction by which the lowered draw-bar is to be made to perform its function. He rests his claim upon the bare idea of having one draw-bar lower than the other. It is true that he surrounds this idea with recitals as to its purpose and explanations as to how it will work in practice, but, as we shall show later, these recitals and explanations add nothing to the primary device, which is simply the lowering of the inner draw-bar of a detached logging truck in order to prevent this draw-bar from striking against sagging logs. The principal question in this case is whether or not that idea is patentable. We believe the question can be approached best by con-

sidering the similar ideas and devices in prior use which are shown by the evidence or are matters of common knowledge, bearing in mind those simple and obvious features of the case already mentioned.

Defendant's Exhibit "C" (Transcript of Record, pp. 75-77) shows a patent issued to G. Komarek November 14, 1911. The specifications, lines 10-14, show that the logging truck exhibited was intended especially for the handling of long logs. Lines 86-91, and claims 2 and 4, show a deliberate and intentional raising of the outer draft beam of each truck to a higher plane than the side sill, and a corresponding raising of the outer end sill to a higher plane than the inner end sill. In lines 89-91, it is said that "the intermediate portion of the front end sill C is inclined upwardly so as to provide for this arrangement of the draft beams."

This feature of the Komarek truck is made plain by the illustrations, and especially by Figure 2. The elevation of the front or outer end of the truck above the rear or inner end, and the corresponding elevation of the front or outer draw-bar, are shown clearly. Reference to the Magor patent, Exhibit "B," pp. 71-73 of the Transcript of Record, will explain the relative position of the parts. Figure 5 of the Magor patent is a detached logging truck having the coupling devices at both ends shown. Attention is called to the relative height of the wheels, the frame of the car, and the coupling devices; also to the fact that the couplers at the two ends of the truck are different, the front or outer coupler making the connection at the extreme end of the

draw-head, while the rear or inner coupler connects at the point "V," materially closer to the bunk. This shows conclusively (if any such showing is necessary) that Chandler did not originate the idea of logging trucks specially constructed to be used in pairs.

Turning now to the Komarek patent, Figure 2, we find the same relative arrangement of parts, except that the front coupler is raised substantially, and the rear coupler is not shown. Figure 3 shows the corresponding raising of the front end sill.

Comparing the Komarek patent with the Chandler device (Transcript, pp. 45-47), we find a striking similarity of general features and arrangement of parts. The only essential difference having any bearing upon this case is that Komarek does not show his inner coupler. It is clear that if an inner coupler were attached to the Komarek truck at the height of the inner frame, in the customary manner, we should have the Chandler idea exemplified to the last detail. Does the failure of Komarek to show an inner draw-bar constitute an essential difference? In other words, does Chandler display inventive genius when he attaches an inner draw-bar to the Komarek truck, at the height of the inner frame, and then explains that his trucks are to be used in pairs?

It is obvious that the Magor trucks and the Komarek trucks must be used in pairs. Magor provides inner coupling devices differing from the outer ones. Komarek does not mention inner couplers at all. However, the construction of detached logging trucks with inner coup-

ling devices of every conceivable type was a familiar practice, and the necessity for such couplers in order to haul the empty trucks in trains is self-evident. Komarek did not show the inner couplers because he claimed nothing new in that respect. He left himself free to adopt any one of the simple devices in common use, but he provided specifically for the raising of the front draw-bar and end frame, while he left on a lower plane the rear end frame, which would determine the height of the rear coupler. In this connection, see the uncontradicted testimony of Mr. Chriswell at page 88 of the Transcript. He says: "In the case of a logging truck there is no mode of construction feasible except to attach the draw-head to the truck itself, and it is the universal practice so to attach the draw-head; in the Komarek patent, which has a draw-bar high at one end and the frame lower at the other, the only feasible way if they were coupled together would be to attach the coupler to the frame which is lower; in a logging truck the lowering of the frame at one end would necessarily result in the lowering of the draw-head at the same end; no other mode of construction would be possible."

If the Chandler patent is valid, it would prevent Komarek or any user of his truck from adopting the necessary and obvious mechanical expedient of attaching an inner coupler to or at the height of his inner frame, and would force him either to lower his outer frame and coupler or to raise his inner frame and coupler to exactly the same height as the outer ones.

Chandler has done nothing but attach to the Komarek truck an ordinary coupler, by familiar means, and at the natural and obvious height.

The Bettendorf patent, Defendant's Exhibit "D" (Transcript, pp. 79-81), relates to car trucks, and not to logging trucks; but it has a very close analogy to logging trucks for two reasons. First, because it is intended particularly for use on cars having removable bodies, or bodies which can be tilted, so that the trucks correspond closely in function to logging trucks (see lines 9-13). Second, and as a result of the foregoing, the coupling apparatus is connected with the truck, instead of the body of the car. This point is brought out in the testimony of Chandler (Transcript, p. 61). He argues that there is no analogy between an ordinary car truck and a logging truck, because in the ordinary car the couplers are not attached to the trucks, but to the body of the car. The Bettendorf truck is therefore of the logging-truck type.

The Bettendorf truck embodies every idea contained in the Chandler truck. The outer coupler is elevated so as to connect with standard equipment, while the inner coupler, the rod "M," which holds the two trucks together when the body of the car is removed or loosened, lies at a much lower plane. It is obvious that the trucks must be used in pairs, and that the inner couplers are adapted only for the coupling of the two trucks of a pair. Chandler's ideas go no further. It is true that the sagging load in one case consists of logs, while in the other case it consists of a car body, but

there is no difference in principle, or in the fundamental ideas involved.

Mr. F. W. Chriswell, chief engineer for the Seattle Car & Foundry Company, testified that his company had for many years been building logging trucks having couplers of different heights, or adjustable to different heights. We quote his testimony, which contains a clear and concise description of various devices in common use which suggest and anticipate Chandler's alleged invention. He says (Transcript, pp. 85 to 87):

"I have been engaged in the construction of logging trucks, car trucks and cars about twenty-three years; we had built a number of cars for different logging concerns where they wished to couple the low trucks having couplers about twenty-six inches from the rail with those $34\frac{1}{2}$ inches high; we built them for the Marysville & Northern, Marysville & Arlington, the Field Timber Company and one or two other concerns where one end of the car was built stereotype, and the other end with the coupler lower to couple with low trucks; we built these cars along in April and May, 1910; all of these trucks were built so they could raise and lower the draw-heads; but they were built that way in order to facilitate shipping; we shipped them out on their own wheels, and in order for them to move on their own wheels they had to have both ends standard height; then a coupler on one end was dropped after they were received; the skeleton logging trucks were of the same type with the adjustable draw-bars; we built one of those for the Marysville & Northern with a

standard height coupler; on that truck both ends were raised so that we could drop either pin, but they wanted it so they could couple their locomotive and train with the low trucks which they had, and we built that car with the draw-bars so they could drop them at either end; that was in April, 1910, if I am not mistaken; we built a car for the Hammond Lumber Company in a similar way; that was a flat-car built with the draw-bars arranged to drop at one end for the purpose of coupling a standard locomotive with the low logging equipment; it is a common practice in passenger-car trucks to build the frames on the two ends of different heights; it is especially necessary in passenger-cars with the bellying sill, what they call the fish-belly sill; the body of the car would interfere with the inner end of the truck frame, consequently they offset that frame, lowering the inner end of the frame; there is no draw-bar usually attached to the frame, though there is one truck or car, a streetcar used in New York City known as the hobble skirt, built in 1910, when the narrow skirts were in use; to get a very low car they built the truck with the forward end projecting out past the end of the car with a draw-bar located on the truck; it was not standard height, but it was higher than the inner end. The inner end was dropped down to clear the inner end of the car; that was a matter within my own observation; I believe you will find nearly all locomotive tenders with high draw-bars next to the engine and low where it couples with the train, that is to clear the fire-box, and one thing and another on the tender; nearly all tenders, I believe, have high and low draw-bars; in the case of six wheeled trucks under heavy equipment steel

cars the trucks are built with a low frame at one end to clear the fish-belly sill."

The attention of the witness was then called to certain illustrations in the Master Car Builders' Association Car Builders' Dictionary of the 1912 Edition, and the witness testified that this is a standard work in common use by car-builders, used by nearly all car-builders and recognized as a standard reference book. The attention of the witness was called to a truck illustrated on page 562 and page 339, and the witness proceeded and testified as follows:

"This truck is a six-wheeled truck for a steel flat-car, the sills belly down here just as the logs would belly down; the frame of the truck is outside of the wheel the same as on a logging truck; this end does not interfere; Figure 348 is the truck which is used under that car; this line (indicating a line on said drawing) indicates the dropping of that frame; the frame of the truck is not shown on the figure; the drawing shows the frame of the car bottom coming up at an angle, and the end frame is dropped down while the other end is up at the position shown by the two end sills; on the high end it is up at the axle line; the frame of the truck comes above the axle line, say two or two and one-half inches; upon the end where the body bellies down the frame is dropped down to the bottom of the axle line so there is probably six or seven or eight inches difference on the frame to clear the belly of the sill; there is no draw-bar on the truck; the draw-bars are located on the car body itself, and are of the same height at the two ends of the car; there are no draw-bars on the truck itself."

Chandler testifies (p. 57): "I do not claim there is any novelty in the idea of having one end of the frame of a truck or of a car higher than the other. I have never seen a *logging truck* having a frame on one end higher than the other." And again on the same page: "I have noticed the Brill trucks on the street cars that pass in front of this building; they use a smaller wheel on one end of the truck than they do on the other and the connecting frame is naturally lower on that end."

Illustrations from other kinds of machines and vehicles might be multiplied indefinitely. Plaintiffs and their attorney seek to distinguish these prior devices on various grounds, chiefly because most of the illustrations are taken from cars or car trucks, and not from detached logging trucks. These distinctions mark no difference in principle. The fundamental fact is that long before Chandler made his alleged invention, the one idea involved in it, namely, having one end of his truck and the corresponding draw-bar higher than the other end and draw-bar, was a device in familiar and common use in the business of building cars, car trucks and logging trucks.

When Chandler was informed by Van Cleve that sagging logs were striking the inner draw-bars of his trucks he must be assumed to have known the familiar practices of his own business. He was chargeable with knowledge that the raising and lowering of coupling devices and log bunks, and the attachment of those devices at various heights according to the needs of the occasion, was feasible and common. He was chargeable with knowledge that it was common practice to have

car trucks with one end lowered in order to make way for a sagging car body or other load, and that it was common practice to build cars and other like equipment with one coupler higher than the other, in order to meet various contingencies. He was chargeable with knowledge of the Komarek patent, which exhibits clearly a detached logging truck built for the hauling of long logs and having one end frame and draw-bar high and the other end frame low, necessarily implying a low draw-bar. He was chargeable with knowledge of the Bettendorf patent, which exhibits a detached truck with a high outer coupler and an inner coupler placed much lower.

Chandler must also be held to have had and used the faculties of ordinary perception before he can be credited with the exercise of inventive genius. The problem which the circumstances created for him had limitations which were self-evident. The use of the trucks on a line having other equipment of standard height suggested and determined the height of the outer draw-bars of each truck. Van Cleve's testimony on page 62 shows this clearly. There were, therefore, three moves possible, namely, to raise the log bunk, to lower the inner draw-bar, or to shorten the inner draw-bar. These alternatives are so simple and obvious that they could not fail to suggest themselves to any observer who gave the subject serious consideration. It is impossible that any one seeing an upper object striking a lower one should not conceive the idea of preventing the contact by lowering the lower object. In its essence, this is the whole scope of Chandler's alleged invention. He seeks to obscure the issue by talk of using the trucks in pairs,

and by suggesting mechanical difficulties of construction; but as we shall show more fully, these things cannot help him. He claims a patent upon the broad general idea of having one draw-bar lower than the other; and if that idea in itself does not involve invention or patentable novelty, his claim is not given merit by these incidental difficulties in its application.

That true invention, as distinguished from mechanical or engineering skill, is requisite to the validity of a patent, and that the presence or absence of this element is a question for determination by the courts, are principles too well settled to require special citation of authorities. The cases distinguishing between invention and the exercises of reason and skill are so numerous that it is impossible to do more than choose a few for purposes of illustration. We believe the following will serve the purpose:

Reckendorfer v. Faber, 92 U. S. 347.

Dunbar v. Myers, 94 U. S. 187.

Atlantic Works v. Brady, 107 U. S. 192.

Slawson v. Grand St. R. R. Co., 107 U. S. 649.

Penn. Railroad v. Locomotive Truck Co., 110 U. S. 490.

Hollister v. Benedict Mfg. Co., 113 U. S. 59.

Preston v. Manard, 116 U. S. 661.

Aron v. Manhattan Ry. Co., 132 U. S. 84.

Mast, Foos & Co. v. Storer Mfg. Co., 20 Sup. Ct. Rep. 708.

Wills v. Scranton Cold Storage & Warehouse Co., 153 Fed. 181.

Star Hame Mfg. Co. v. United States Hame Co., 227 Fed. 876.

Hansen v. Slick, 230 Fed. 627.

Keene v. New Idea Spreader Co., 231 Fed. 701.

Marshall v. Wist, 232 Fed. 606.

Rauch & Lang Carriage Co. v. Hanlon, 233 Fed. 673.

In *Dunbar v. Myers*, the invention claimed was for the use of two projecting plates in conjunction with a saw for the purpose of holding the sawed edges away from the saw and preventing binding or friction. It appeared that there was already in common use a device consisting of one such plate, and it was held that no invention was involved in the mere use of two such plates, although of somewhat different form and arrangement. It is said, on page 197:

“Invention or discovery is the requirement which constitutes the foundation of the right to obtain a patent; and it was decided by this court, more than a quarter of a century ago, that unless more ingenuity and skill were required in making or applying the said improvement than are possessed by an ordinary mechanic acquainted with the business, there is an absence of that degree of skill and ingenuity which constitute the essential elements of every invention.”

In the case of *Atlantic Works v. Brady*, the invention claimed was in adapting propellers such as are ordinarily used on steamboats to the work of dredging by stirring up the sediment at the bottom of a river so it would be carried away by the current. It appeared that ordinary steamer propellers had been used for this purpose, the steamer working backwards. It was held that there was no patentable invention or discovery involved in the obvious device of placing propellers at the front end of the boat when it was desired to operate in this way, nor in the mere lengthening of the propeller blades so as to accomplish the work more effectively. It is said, at page 199:

“The process of development in manufactures creates a constant demand for new appliances, which the skill of ordinary head-workmen and engineers is generally adequate to devise, and which, indeed, are the natural and proper outgrowth of such development. Each step forward prepares the way for the next, and each is usually taken by spontaneous trials and attempts in a hundred different places. To grant to a single party a monopoly of every slight advance made, except where the exercise of invention, somewhat above ordinary mechanical or engineering skill, is distinctly shown, is unjust in principle and injurious in its consequences.”

In *Slawson v. Grand St. R. R. Co.*, the patent covered an improvement in fare boxes such as are used in street cars. It is said, on page 654:

“The elements of the contrivance, namely, the fare-box, the headlight and the reflector, are all old. What is covered by the patent is simply the making of an aperture in the top of the fare-box and turning the rays of the head-lamp through it into the box by means of a reflector. In other words, it is the turning of rays of light where they are wanted by means of a reflector, and taking away an obstruction to their passage. The facts of general knowledge of which we take judicial notice teach us that devices similar to this are as old as the use of reflectors. The new application of them does not involve invention.”

The case of *Penn. Railroad v. Locomotive Truck Co.*, 110 U. S. 490, presents a very close analogy in principle to the present case. There the inventor had conceived the idea of using in connection with the pilot wheels of a locomotive a certain form of truck previously used for railway cars, and possessing manifest advantages in the combination of strength with freedom of movement. The inventor was able to advance every argument which is presented here in favor of Chandler, but with much greater force. He was the first to conceive the idea of using such trucks under a locomotive; it was, as Chandler says, a “radical de-

parture;" the locomotive required only one such truck, while ordinary cars required two, and there are other obvious differences in the relations of the truck to other parts of the mechanism, and difficulties in the working out of the idea. Nevertheless the Supreme Court held that the idea of using under a locomotive a type of truck previously used under cars did not involve invention. It is said on page 494:

"It is settled by many decisions of this court, which it is unnecessary to quote from or refer to in detail, that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, *even if the new form of result has not before been contemplated.*" Numerous authorities are cited.

The statements of the Supreme Court in denying patentability to the improvement involved in the case of Hollister v. Benedict Mfg. Co., 113 U. S. 59, seem peculiarly appropriate to the present case. It is said on page 73:

"As soon as the mischief became apparent, and the remedy was seriously and systematically studied by those competent to deal with the subject, the present regulation was promptly suggested and adopted, just as a skilled mechanic, witnessing

the performance of a machine, inadequate, by reason of some defect, to accomplish the object for which it had been designed, by the application of his common knowledge and experience, perceives the reason of the failure, and supplies what is obviously wanting. It is but the display of the expected skill of the calling, and involves only the exercise of the ordinary faculties of reasoning upon the materials supplied by a special knowledge, and the facility of manipulation which results from its habitual and intelligent practice; and is in no sense the creative work of that inventive faculty which it is the purpose of the Constitution and the patent laws to encourage and reward."

In *Preston v. Manard*, the inventor observed that ordinary hose reels were not large enough to allow water to flow through the hose when wound on the reel, so procured a patent covering reels large enough to allow such flow. The Supreme Court held (p. 664) that all of the parts of such enlarged reel were old and performed their usual function; that it was matter of common observation that water will flow through a hose not too much compressed or restricted; and that "to sustain this patent would be to deprive the public of the right to arrange and use a well known apparatus in the only way in which its purpose can be beneficially accomplished."

In the case of *Aron v. Manhattan Railway Co.*, the plaintiff claimed a patent upon a device by which the gates of street cars could be opened by levers. The patentable feature of the claim consisted in such an adjustment of the appliances that the gates of two adjoining cars could be opened at the same time by an operator standing on the platform. It appeared that appliances, which were the same in all substantial points, were in previous use for opening one gate at a time, and it was held that there was no patentable invention or discovery in the mere location of the levers at a different place so they could be operated more conveniently. It is said, on page 90:

“The patentee is entitled to the merit of being the first to conceive of the convenience and utility of a gate opening and closing mechanism which could be operated efficiently by an attendant in the new situation. His right to a patent, however, must rest upon the novelty of the means he contrives to carry his idea into practical application. It rarely happens that old instrumentalities are so perfectly adapted for a use for which they were not originally intended as not to require any alteration or modification. If these changes involve only the exercise of ordinary mechanical skill, they do not sanction the patent; and, in most of the adjudged cases where it has been held that the application of old devices to a new use was not

patentable, there were changes of form, proportion, or organization of this character which were necessary to accommodate them to the new occasion. The present case falls within this category."

In *Mast, Foos & Co., v. Storer Mfg. Co.*, the patent covered a wind-mill having a device for converting rotary motion into reciprocal motion. The device itself was old, but the particular use made of it in the wind-mill was new. It is said (20 Sup. Ct. Rep., p. 711):

"Having all these various devices before him, and whatever the facts may have been, he is chargeable with a knowledge of all pre-existing devices, did it involve an exercise of the inventive faculty to employ this same combination in a wind-mill for the purpose of converting a rotary into a reciprocating motion? We are of the opinion it did not."

And on page 712:

"He invented no new device; he used it for no new purpose; he applied it to no new machine. All he did was to apply it to a new purpose in a machine where it had not before been used *for that purpose*. The result may have added to the efficiency and popularity of the earlier device, although to what extent is open to very considerable doubt. In our opinion this trans-

fer does not rise to the dignity of invention."

In *Wills v. Scranton Cold Storage & Warehouse Company*, the patent covered an alleged improvement in the construction of elevators in cold storage plants. It appears that by reason of the entrance of currents of warm air from the elevator shaft when the elevator was being operated, it was necessary to shut off the elevator shaft at each floor from the storage room by means of ante-rooms which could be closed at each side by doors. The patentee in this case conceived the idea of avoiding the necessity for these ante-rooms by the device of attaching rubber flanges or flaps to fill up the space between the floor of the elevator and the elevator shaft, thus cutting off the air current. It was held that this device did not involve any patentable invention. It is said, on page 183:

"When the difficulty to be overcome is so obvious a one, as the escape or entrance of air through the open spaces between the elevator car and the shaft through which it travels, into the rooms communicating therewith, it is hard to conceive what invention there can be in making air-tight those open spaces by bridging them with rubber flaps, or any of the other well-known devices for such purposes. It would seem that the conception or thought of doing so, was as obvious as the means employed. To put weather strips on a window or door to prevent the

ingress of cold air or the escape of warm air, does not involve invention, any more in the thought than in the means employed."

In *Star Flame Mfg. Co. v. United States Flame Co.*, it is said (227 Fed., p. 883):

"The most, then, that can rightfully be said of the combinations stated in the claims in suit is that they are but a mere carrying forward of the original thought, a change in form, an improvement in degree, without substantial change in either means or result. This was not enough; it was not invention." Numerous authorities are cited.

In the case of *Hansen v. Slick*, the patentee claimed an invention for renewing by a pressing process the worn steel wheels of railway cars. Substantially the same process was already in use for pressing new wheels out of metal blocks. It was held that the adaptation of the old process to this analogous use was not invention; and it is said (230 Fed., p. 632):

"Did this change involve invention? The question of invention is a relative one and is to be considered, not as an abstract theory, but as a concrete, practical question in a particular art. Modern conditions have made high engineering and mechanical skill ordinary incidents in

many industries, and such technical skill is to be regarded as the incidental advance of commercial pursuits. It follows therefore that such advance in the art as results from this skill the public is entitled to avail itself of as a fruit of mechanical growth and advance. In such highly developed broad arts it is not everything that is beyond mechanical work that is to be deemed invention; but the general public, for whose benefit the patent system was created, are also entitled to the benefit of those who are skilled in such art. "Invention" is what rises to a higher plane than skill, both engineering and mechanical. It will therefore be seen that when it comes to a question of monopolizing for 17 years the fitting of worn car wheels to further use, such monopoly should be restricted to such novel acts as are beyond the sphere of skilled engineering and mechanical steps in such art. Moreover, we must not lose sight of the fact that one of the usual way marks of invention is that it generally follows futile efforts of those skilled in an art to solve some recognized difficulties. Substantial advance, marked improvement, progressive steps in an art, however beneficial, are not in themselves evidence of invention. They are to be expected, and, as the art progresses, more engineering skill, more

mechanical progress, but less invention, are naturally to be looked for. It is when skill and progress stop abreast of an obstacle that inventive genius intervenes and invents."

In *Keene v. New Idea Spreader Co.*, it is said (231 Fed., p. 709):

"True, prior art becomes at times a source of confusion and even abuse. Still, to insist that claims disclose invention or discovery where their substantial equivalency in elements, in mode of operation and results, plainly appear in two or more earlier patents or publications, though not all in one patent or publication, is to ignore the very terms of the patent act. Above all, counsel's theory is opposed to the settled course of judicial decision. As was said, in holding a claim to be void for want of invention, in *Dilg. v. George Borgfeldt & Co.*, 189 Fed. 588, 590, 110 C. C. A. 568, 570 (C. C. A. 2d Cir.):

' * * * Although all the elements of the claim may not be found in any one patent, it is clear that they are all to be found in different patents. No single patent may anticipate, but they all have a bearing upon the question whether invention or mechanical skill was involved or required.'

Again, in *Duer v. Corbin Cabinet Lock Co.*, 149 U. S. 216, at 222, 13 Sup. Ct. 850, at 853 (37 L. Ed. 707), when affirming a decree dismissing the bill in a patent suit, Mr. Justice Brown said:

‘In view of the advance that had been made by prior inventors, it is difficult to see wherein Orum displayed anything more than the usual skill of a mechanic in the execution of his device. All that he claims as invention is found in one or more of the prior patents.’

And further (149 U. S. 223, 13 Sup. Ct. 853 [37 L. Ed. 707]):

‘In view of the fact that Mr. Orum had no actual knowledge of the Gory patent, he may rightfully claim the quality of invention in the conception of his own device, but as he is deemed in a legal point of view to have had this and all other prior patents before him, his title to invention rests upon modifications of these, too trivial to be the subject of serious consideration.’ ”

In *Rauch & Lang Carriage Co. v. Hanlon*, the patent covered the use in front of street-cars windows

or closed automobiles of the ordinary swinging windshields commonly found on open automobiles. It is said (233 Fed., p. 675):

“Analyzing the advance made by Hanlon, we see that, from one point of view, when the user of the open car found that if he had the upper part of the windshield swung out, the storm beat in under it because this adjustment left an opening through which rain and snow could get in, he put in a pane of glass or a window, fixed or sliding, to close the opening and keep the storm out. From the other point of view, when the user of the closed car observed that the front window, when shut, would become blurred with rain or snow, he added the projecting, swinging shield or visor found in the open car, and so insured a line of clear vision through the inner glass. From neither point of view can we see invention. To put a glass in an opening, or to shelter an existing glass window by the same means common for sheltering an existing open window, seems obviously within the intelligence of the ordinary person—to say nothing of one who is ‘skilled in the art.’ Each is, at the best, as applied to closed automobile bodies, only a new use of an existing structure, not requiring mechanical adaptation, save in the form or

shape of the supporting hinges or guides—indeed, no mechanical adaptation whatever is necessary, unless it happens that the two places of application are of different size or shape. See illustrative double use cases collected in note to *Weir Frog Co. v. Porter*, 206 Fed. 670, 674, 124 C. C. A. 470.

The absence of invention is emphasized by the fact that when the patentee lowers his sliding window in his street car vestibule, as he does in pleasant weather, his structure no longer embodies his patented structure, because he has no closed glass window protected by swinging glass in front. When the question of infringement depends upon opening or closing a window it is not easy to understand how the patent can be the embodiment of an inventive step."

In most of the foregoing cases, the patent rejected for want of invention presented higher claims for consideration than can be found in the Chandler patent, because in them there was generally a new use of old devices, or some slight change of an old device, while the Chandler patent has not even those merits. He claims a patent upon the bare idea of putting a draw-bar low enough so that it will not strike the normal load on the truck. He claims to have invented the thought that a draw-bar which strikes the load ought to be

lowered so that it will not strike the load. In his truck, no part is new. He makes absolutely no claim of novelty in the construction, attachment or operation of any part. His wheels, frame, bunk and draw-bars are precisely those in familiar use, and they perform exactly the same functions which those parts always performed. His draw-bars are constructed and attached in the ordinary way, and his high draw-bar serves the familiar purpose of coupling loaded pairs of trucks together or to other equipment, while the low draw-bar performs the equally familiar service of coupling the pairs of empty trucks to one another. It has no other function, and no peculiarity of construction, attachment or operation, either in itself or in connection with other parts.

The District Court appears to have been impressed by the fact that it required some study for Chandler to determine whether a car of this type would be feasible or not, and to work out the mechanical details of construction. We cannot see how these difficulties add to the merit of his claim. If in working out the details of construction Chandler had been called upon to invent any new device, he could and would have patented that device. The fact that he makes no claim of that kind is sufficient evidence that the mode of construction adopted contains nothing novel. An idea which does not involve invention is certainly not made patentable because its working out into a practical machine requires some study.

The same answer applies to the suggestion that the feasibility of this truck required careful consideration.

Doubtless it did. Perhaps Chandler weighed carefully the relative merits of the three obvious methods by which the striking of these long logs against the inner draw-bars of his trucks might be avoided, namely, the raising of the log bunk, the lowering of the interfering draw-bar, and the shortening of that draw-bar. Perhaps in considering those things he brought to bear a considerable measure of skill which his experience in the business had given him. It may be that he arrived at a wise choice. But these things are not invention. To choose wisely one of three obvious alternatives is not invention, even though the choice requires skill and study. This is illustrated abundantly by the authorities. We understand that the District Court regarded the making of this choice as evidencing something more than ordinary mechanical skill. Suppose that it evidenced high mechanical skill, or even engineering skill, the result is the same. The cases cited by us show that the "expected skill of the calling" extends into the higher realms of engineering and expert service.

What Chandler claims a patent upon is the broad idea of having one draw-bar lower than the other. If he has invented or discovered anything, it is that idea of conception. It is wholly immaterial how much skill was necessary to determine whether that idea was better or worse than some other idea. He is not claiming a patent upon any result of his supposed deep and skillful inquiries, but upon the broad and obvious conception which must have preceded those inquiries.

One other point remains upon which the issue has been obscured and confused. This is the reference to

the use of trucks in pairs. It seems to be thought that it is a point of singular merit, that Chandler conceived the idea of using these trucks in pairs. That detached logging trucks must be used in pairs is self-evident. Does it require inventive genius to discover that the high draw-bars of two trucks will meet and couple, and that the corresponding low draw-bars will likewise meet and couple? It is one of the most obvious of facts. A child six years old would soon discover that a train could be made up in this way, and the ordinary adult would see it at the first glance. If any suggestion were needed, it would be supplied in abundance by the Komarek truck, the Bettendorf truck, the Brill truck, and the numerous other trucks and cars so constructed as to be used only in pairs.

That Chandler knew this truck was not patentable is shown by his own admissions. In his letter to Mr. Kerry, dated November 17, 1914, appearing as Plaintiff's Exhibit 3, at page 53 of the Transcript, Chandler says:

"We note that you want the draw-bar to be of standard height, that is, $34\frac{1}{2}$ inches from top of rail to center of draw-bar. In this connection, would say that Clark & Wilson found that where they used the standard height coupler on their trucks and hauled very long logs the logs bellied down and interfered with the inside coupler, and they told us that if they ordered any more trucks they would want

us to furnish them a truck having the outside couplers of standard height and the inside couplers 10 inches lower. I am making a sketch to explain more fully the point that I am trying to bring out, and if after thinking this over you decide that you would like to have us send you a set of trucks in which the couplers are of different heights, we would be glad to do it.

As long as you are getting three different types of truck, it might be a good idea to embody as many ideas as you could in the three sets and then make up your own design from the three and let everybody bid on them, *as all of the manufacturers can build any type of truck which you desire.*"

He describes this truck, and tells Mr. Kerry that any manufacturer can build it; then three months later, after the Seattle Car & Foundry Company has outbid him, and Mr. Kerry, taking him at his word, has ordered the trucks from that company, he applies for a patent. He is now claiming an injunction and damages on account of the use of the very trucks upon which he thus invited competition. Besides, he does not even claim credit for the device, but ascribes it to Clark & Wilson.

Turning now to the question whether Chandler conceived the idea covered by his patent or borrowed it

from Withrow, we find some conflict in the evidence, but the preponderance is altogether against Chandler, and under the circumstances the foregoing letter appears to turn the scale conclusively.

The deposition of J. R. Van Cleve (Transcript, pp. 61-63), is to the effect that as an employee of the Northwestern Equipment Company he called several times on the Clark & Wilson Lumber Company; that this company had been handling logs in flat cars having couplers of standard height, and this made it necessary to have their detached trucks furnished with couplers of standard height, so as to couple with the flat cars; that this standard height coupler is about a foot higher than the coupler on the ordinary logging truck; that Clark & Wilson were handling very long logs, and reported that these logs sagged and struck the inside couplers and caused trouble; that he reported this trouble to Chandler, and later reported to Clark & Wilson that Chandler had developed a truck with one high coupler and one low; that Clark & Wilson said, "If you people can furnish that kind of a logging truck, that is the kind we want." Van Cleve gives no definite dates.

The testimony of Chandler, appearing on pages 47, 56 and 108 of the Transcript, shows that this question of affording clearance for sagging logs was first brought to his attention by Van Cleve, and he says that the idea of lowering the inner draw-bar did not occur to him for at least thirty or forty days after Van Cleve reported the difficulty to him.

Ira L. Withrow testified (Transcript, p. 63) that he was superintendent for Clark & Wilson; that in the spring of 1914 they were hauling long logs, and had trouble because the logs interfered with the inner draw-bars; that he had a talk with Van Cleve about it. Withrow says (p. 64):

“He was there one day and we were having trouble with the trucks, and I told him he would have to do something and that the proper way to do would be to drop the draw-bars, and he said that as we had the standard coupler fiat-cars on the outside—he looked it over and thought it would be a good idea. At first he thought it would not do because if we set out one of them we would have to set out the pair; I explained to him that this made no difference as they all had to go in pairs anyway; he said he thought that would be a good idea; this was in the early part of 1914, sometime in the Spring; I would not say just when; it was during one of his trips down there; it is not true that I complained to Mr. Van Cleve without suggesting any remedy or that Mr. Van Cleve came and told me about this idea after reporting to Mr. Chandler and having him study the question; I told Mr. Van Cleve.”

And again on page 65:

“I suggested this idea to Mr. Van Cleve—this idea of the high and low draw-bar;

I thought it was practical construction; I suggested the same thing to Mr. Vachon of the Seattle Car Company; I never made any sketches of it; I just told him it could be done; we were looking at the trucks one day there—there was no way decided on how it should be done; I am quite positive that that idea came from me, and I suggested it to Mr. Van Cleve; I suggested to Mr. Van Cleve the difficulty that was being experienced and also that the draw-bar should be dropped; we said that we wouldn't buy any more unless this was done; that we would order no more trucks without the inside draw-bar being lowered."

His testimony on page 67 shows that Clark & Wilson commenced hauling these long logs ten days or two weeks after February 9th, 1914, and that Van Cleve came down soon afterward. This would, in all probability, make the date of Van Cleve's visit not earlier than February 25th.

E. V. Vachon, an employee of the Seattle Car & Foundry Company, testifies as follows (Transcript, pp. 104, 105):

"I remember an occasion when this question of the interference of long logs with the inside draw-bars of detached trucks and the mode of overcoming that objection was discussed by Mr. Chriswell

and Mr. Withrow in my presence; I don't remember the exact date, but it was in the early part of 1914, and we were at the camps of the Clark & Wilson Lumber Company, Mr. Withrow being the superintendent, and were talking with him about the difficulties experienced with long logs in the clearance of the inside equipments; I don't remember just the conversation, but the substance of it was that some arrangement should be made to provide for that, and the practical way seemed to lower the couplers on the inside so that they would not interfere, causing accidents or anything of that kind."

On cross examination the witness testified as follows:

"Mr. Withrow suggested that this lowering of the couplers on the inside was the practical way; I do not remember his exact words; it was just to the effect that the coupler should be lowered at the inside to take care of that; he thought that was the practical way of obviating the difficulty; this was in the early part of 1914."

F. W. Chriswell, chief engineer of the Seattle Car & Foundry Company, testifies as follows (Transcript, p. 81):

"March 16, 1914, I was at the camp of the Clark & Wilson Company with Mr. Vachon and Mr. W. W. Clark. We met Mr. Withrow there and they had various trucks in service, the Northwestern, our trucks, and the Russell trucks, and we were discussing the merits of the trucks and Mr. Withrow called attention to the fact that the sagging of the logs interfered with the coupling, and said in order to make them serviceable for hauling long logs the inner draw-bar would have to be lowered; he offered no suggestion how it could be done, just said it should be lowered, asked me if it could be done and I told him it could."

And again on page 91:

"Mr. Withrow discussed with me the question of building these logging trucks with high and low draw-bars; I am absolutely positive that he suggested to me the idea of lowering the inner draw-bar."

We therefore have not only the direct and positive statement of Withrow that he suggested the lowering of the inner draw-bars to Van Cleve, but the testimony of two witnesses that Withrow made the same suggestion to them before he could possibly have received it from Chandler through Van Cleve. There is nothing in Van Cleve's deposition to the contrary. Withrow says he told Van Cleve they would not give any more

orders for these trucks without the low draw-bar. Van Cleve says he told Withrow that Chandler had *developed* a truck with one high coupler and one low, and that Withrow answered, *"If you people can furnish that kind of a logging truck, that is the kind we want."* All of this confirms the statement of Withrow that he suggested the idea, and that the only question was as to the feasibility of making a truck which would embody the idea.

Finally, Chandler says in his letter of November 17, 1914 (Transcript, p. 53):

*"Clark & Wilson told us * * * that if they ordered any more trucks they would want us to furnish them a truck having the outside couplers of standard height and the inside couplers ten inches lower."*

He does not say he has invented a novel form of truck to meet difficulties encountered by Clark & Wilson; he says Clark & Wilson told him the kind of truck they wanted. He goes on to say that "all of the manufacturers can build any type of truck which you desire." If Chandler really thought he had invented this type of truck, and had an exclusive right to sell it, he would have mentioned that fact, instead of inviting competition.

Withrow, who is not a skilled mechanic, hauled long logs for ten days or two weeks on the high trucks, noticed the interference of the logs with the inner draw-bars, and perceived immediately that the trouble could

be remedied by lowering the inner draw-bars. We maintain that this is an obvious fact which any sensible man would perceive. Chandler has common sense, and claims mechanical and professional skill. He must be assumed to have brought those faculties to bear upon the problem presented to him. He must be assumed to know the form and mode of construction of the various trucks in use, and of their parts, and to be familiar with the adjustments and expedients which belong to his business. Considering the extremely simple and obvious nature of the fundamental idea involved, the narrow limits which the nature of the case fixed for the exercise even of judgment or choice, the several prior devices embodying the idea in substantial entirety and the numerous devices suggesting it in principle, and bearing in mind the fact that the difficulty to be solved, with its attendant circumstances, pointed to and virtually demanded the precise remedy applied, we submit that the total lack of invention or patentable novelty is clear.

Further, whatever merit attaches to this idea belongs to Withrow, and not to these plaintiffs. There may be some question whether Withrow's suggestion was communicated by Van Cleve to Chandler; but there is no question that Withrow conceived the idea and suggested it to Van Cleve, the agent of plaintiffs.

Respectfully submitted,

VEAZIE, McCOURT & VEAZIE,

Attorneys for Appellants.

No. 2883.

In the United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA and NEHALEM RIVER
RAILROAD COMPANY, a corpora-
tion, and A. S. KERRY,

Appellants,

vs.

ELBERT G. CHANDLER and
NORTHWESTERN EQUIPMENT
COMPANY, a corporation,

Appellees.

Upon Appeal from the District Court of the United
States for the District of Oregon.

APPELLEES' BRIEF.

WILLIAM R. LITZENBERG,
904-905 Wilcox Bldg., Portland, Ore.,
Solicitor for Appellees.

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APPELLEES' BRIEF.

QUESTIONS INVOLVED.

Is United States Patent Number 1,140,875, issued
May 25, 1915, to Elbert G. Chandler, for improvements
in LOGGING TRUCKS, valid?

- (a) Did the improvement involve invention?
- (b) Was Chandler the first inventor thereof?

The opinion of the court below (Record, pages 27-34), very clearly and with *expressed satisfaction*, decided these questions in the affirmative.

A strong *prima facie* case was created by the issuing of the patent soon after the application was filed, without any change therein, other than the addition of the fourth claim, submitted in connection with an argument (R. 68-70), pointing out to the Examiner why the Magor patent cited by him had no bearing whatever on the invention involved in the application. As stated in *Streaton v. Wire-Glass*, 97 Fed. 950; 38 C. C. A. 573, "*The patent carries with it the presumption of novelty, and the trained experts of the patent office have decided that what was done arose to the dignity of an invention.*"

Again, as stated by this Honorable Court in *Morton v. Llewellyn*, 164 Fed. Rep. 692:

"Apart from the presumption of novelty that always attends the grant of a patent, *the law is that where it is shown that a patented device has gone into general use, and has superseded prior devices having the same purpose, it is sufficient evidence of invention in a doubtful case.*"

The invention here involved won in competition with other devices for the same purpose. It was so satisfactory that defendant *would not have the others*. Defendant himself says (R. p. 101):

"Before that I had never seen or heard of any logging trucks of that kind; I was in the logging business about thirty years; it was quite a radical departure from anything of the kind made before; it was quite a difficult problem always to haul long logs without having them to interfere, and we had lots of difficulty; going around the curve the draw-bar would hit the logs and tip the car over or throw it off the track; these trucks with a high and low draw-bar was a very clever solution of the problem. I don't know how we would get along without it in the present system of logging."

The invention here involved is best explained in a part of the specification, copied from the patent (R. 46), as follows:

"My invention relates to logging trucks, such as are used in pairs for hauling long logs, one truck being placed under each end of the log. It is quite common for these logs to be as much as *ninety feet long*, and because of their length, and the distance between the trucks, which must necessarily be placed near the ends of the logs, said logs sag in the middle sometimes low enough to almost engage the track. Because of this sagging, the logs frequently engage and rest upon the inner

ends of the truck frame, and the draw-bar thereof, and thus operate to prevent the trucks from turning under the log-bunk thereupon, which frequently results in the derailment of a truck.

The object of my invention is to provide such an improvement in logging trucks, which are used in pairs at the opposite ends of long logs, that no matter how much the logs sag between the trucks, they will not engage the truck frame, nor the draw-bar thereof. I accomplish this by constructing the trucks so that the draw-bars at the outer ends thereof are at standard height, and are adapted to be coupled to the draw-bars on standard railroad equipment, while the draw-bars on their inner, or adjacent, ends are positioned considerable lower than are the outer draw-bars, thus giving clearance for a log resting upon the car-bunks, to sag to the limit without interfering with the inner ends of the trucks or the inner draw-bars.

When returning the logging trucks empty, they are, of course, readily coupled together at their inner ends, because at their inner or adjacent ends, the draw-bars, while lower than the standard draw-bars, are of substantially the same height and can be coupled together, while the

draw-bars at their outer ends are standard height.

* * *

So far as I am aware, I am the first to provide a pair of logging trucks having their draw-bars at their outer ends at standard height, and having their inner ends constructed low to give clearance for the sagging of the logs placed thereupon, with their inner draw-bars also below standard, to avoid interference with the sagging log, and thus to avoid the serious objection of the logs engaging and resting upon the inner ends of these logging bunks, and the inner draw-bars, and interfering with their following the track upon which they are to run.

What I claim and desire to secure by Letters Patent is:

1. *A pair of logging trucks having at their outer ends draw-bars at standard height, and having at their inner ends, draw-bars arranged below standard height, whereby to give clearance for sagging logs thereon, and at the same time being adapted to be coupled to each other, when said trucks are brought together.*"

Claims 2, 3 and 4 are not copied herein.

The type of truck involved herein, therefore, is a *disconnected logging truck, having draw-bars connected thereto, at both ends, and made a part thereof.*

Connected trucks are such as are placed under the opposite ends of flat-cars, passenger-cars, street-cars, and the like, and are thus permanently connected together by means of the car bodies. On such cars the *draw-bars are connected to the frame or body of the car*, at its opposite ends, and *are not built as a part of the truck*. The line of draft is through the car body, or car sill. It is this kind of car, or connected trucks, to which Mr. Chriswell, witness for defendant, refers in most of his testimony, and not a disconnected logging truck.

As stated in the opinion of the court below (R. 29):

"The industry of hauling logs of *considerable length*, it seems, has sprung up recently." Up to the time of Chandler's invention these logs were hauled on flat-cars, or, on the common logging trucks having draw-bars low at both ends, thus rendering them incapable of use with standard equipment of common carriers without the use of connecting goose-necks, or other special connecting devices, not now permitted by Interstate Commerce Rules, or, they were hauled on logging trucks which had standard height draw-bars at both ends, and in which the difficulty from the sagging logs striking the draw-heads was avoided by having *high* log-bunks, or bolsters, which raised the center of gravity too high.

The difficulty of the unusually long logs striking the inner draw-bars of the trucks and thus causing a derailment of the trucks, was first brought to Mr. Chandler's attention by his salesman, Mr. Van Cleve,

in connection with trucks which had been furnished to Clark & Wilson by Mr. Chandler's company; by the Seattle Car Company, and by The Russell Car and Foundry Company. Mr. Chandler, according to his testimony (R. 48), and the testimony of Mr. Van Cleve (R. 61), after studying the problem some time, decided that the construction of his truck would permit it, and hit on the idea of lowering one of the draw-bars of each disconnected logging truck, and then using them in pairs with the low draw-bars there between, whereby said logging trucks could be connected to each other, when empty, by means of the low draw-bars, while the draw-bars on their outer ends were of standard height. Thus each pair would constitute a unit which could be connected with standard equipment. After the conception of this idea, Mr. Chandler found that there were difficulties in the way of reducing it to practice. Disconnected logging trucks were short and the draw-bars thus arranged would be out of alignment with each other, with an indirect line of draft through the truck and *"it took time and study to work this idea out and embody it in a practical logging truck; we were working on the idea some two or three months."* (R. 48).

After the conception of an idea, it is necessary to reduce that idea to a practical and useful form before it can be the subject of a patent, or of any value whatever, and, as the court below said (R. 31): "** * * that is exactly what Mr. Chandler has done in this case.*"

After giving full consideration to the question of mechanical skill, and to the difficulties which had to be overcome, and the manner in which they had theretofore been met, the court says (R. 30-31):

“So that it may be seen from taking into consideration the difficulties presented, and all of them, that it required more than ordinary mechanical skill to work out the problem. Hence the idea was hit upon to lower the draw-bar at one end of each truck, and that these draw-bars would co-operate, and the outer ends of the trucks as thus combined, having the standard draw-bar, would co-operate with the ordinary flat-car.”

The facts in this case are best had from the testimony of Mr. Chandler (R. 47-61); Van Cleve (R. 61-63); the correspondence between Chandler and Kerry (R. 52-55); and particularly by the testimony of Defendant Kerry (R. 94-104).

In this connection, the attention of the court is called to the fact that, after Mr. Kerry had cancelled the order given to Mr. Chandler, and Mr. Chandler had notified him that the idea of a high and low draw-bar was his invention and could not be built by the Seattle Car Company, and that he would have to sue them if they infringed, Mr. Kerry immediately got a bond from the Seattle Car Company to protect himself (R. 99). Thus Mr. Kerry, the defendant of record, is placed in a better position, and his testimony was more frank, and

less prejudiced, than it might have been had he felt that he, or his company, would be held responsible for the infringement. On the other hand, witnesses E. W. Chriswell and E. V. Vashon testify as employees of the Seattle Car and Foundry Company, the company which used unfair methods to get the order, and which is in fact the real defendant, because of its bond, while witness Ira L. Withrow was formerly in the employ of the Clark and Wilson Company.

Defendant Kerry's own testimony, on cross-examination (R. 99-104), (Quoted on page of this brief), is in itself abundantly sufficient, we must believe, to cause this Honorable Court to affirm the decision of the court below. This evidence, no doubt, had much to do with causing the court below to say, "*I think the question resolves itself very satisfactorily in favor of Mr. Chandler's being the originator of the idea, to say nothing of the matter of reducing it to practice.*"

CHANDLER'S TESTIMONY.

Mr. Chandler very positively testified as follows:

His Dealing With Clark and Wilson.

"In the fall of 1913, Clark and Wilson asked us, and the Seattle Car Company, and the Russell Car and Foundry Company, to send them two sets of trial trucks" (R. 47). "This we all did.

"Mr. Van Cleve, who was then our salesman, called on the Clark and Wilson Company several times during the winter

to watch the operation of our trucks and see that any small difficulties that might be encountered were taken care of. After one of his visits to Clark and Wilson camp he stated that Mr. Withrow had complained about *all of the trucks giving trouble* from the logs bellying down and hitting the inside draw-bar, and that if they bought any more trucks they would want a truck that would take care of this difficulty; we studied the matter over to a considerable extent; there were several ways in which the matter could be taken care of, but most of them had some objection, either to the Interstate Commerce rules for common carriers, or some other objection, and all of them were discarded; *we finally decided that the construction of the truck would permit us to use the idea of a high-low draw-bar*; that is, a draw-bar of standard height on the outside to connect with the standard equipment which was already on the road, and we hit on the idea of lowering the other draw-bar to a considerable extent below that point to take care of any bellying down that the logs might have during the transportation; there were some difficulties that we ran up against in the construction, but these were mechanical difficulties that we finally overcame. The next time Mr.

Van Cleve called upon Clark and Wilson *he told them that we would in the future be prepared to furnish them with trucks having a draw-bar of standard height on one end and a draw-bar of considerable lower height on the other side*; Mr. Van Cleve stated that Clark and Wilson told him that if we could build them cars with a high-low draw-bar, that was the kind of truck they would want; that Mr. Withrow, or anyone connected with Clark and Wilson, *did not suggest to me the idea of a high draw-bar at one end of a logging truck and a low draw-bar at the other end*. I worked that idea out after Mr. Van Cleve reported the objections made by Mr. Withrow; it took time and study to work this idea out and embody it in a practical logging truck; we were working on the idea some two or three months; that in the past there had been logging trucks built with draw-bars having a standard height of $34\frac{1}{2}$ inches above the top of the rail and logging trucks with draw-bars having a lower height at both ends, the draw-bars on either end being at the same height but in different cases this height varied, being sometimes 26 inches and sometimes $34\frac{1}{2}$, and sometimes between those heights to suit the individual requirements of the

particular case, but in no case did the logging truck have a coupler at one end at a considerable distance above that on the other; the draw-bars were in alignment so that the line of draft was direct; in the past they have taken care of the difficulty of these sagging logs in some cases by using a very low draw-bar on either end of the truck and using a goose-neck to connect it with the higher draw-bars on the standard equipment, the logging trucks having low draw-bars on both ends; in some cases the height of the bunk has been raised far enough above the draw-bars to give clearance while the logs were being transported."

His Dealing With Mr. Kerry.

"That in November, 1914, I think it was, Mr. Kerry (defendant) wrote us a letter stating that in the early part of 1915 he would be in the market for forty sets of logging trucks, and that he was asking the Seattle Car Company and the Russell Car and Foundry Company, as well as ourselves, to send down a sample truck which he could use and decide which truck was best for his service, and on receipt of his letter I wrote him and asked him if he would allow us to send him a new type of truck

which we had developed having a high-draw-bar on one end and a low draw-bar on the other, and we set forth in this letter the advantages this type of construction had; this was around the latter part of November; Mr. Kerry answered that he would be glad to have us send this truck, and that with the long logs which he was going to handle the trucks would certainly need all the clearance that we could give them; we sent down a set of sample trucks having this idea of the high-low draw-bar embodied in it; the other companies sent sample trucks having draw-bars of standard height, 34½ inches on either end, and *all three trucks were put into service*; after Mr. Kerry had tried out the trucks I went down there one day, and *he gave me an order for forty sets, and five days after that he came to town and stated that representatives of the Seattle Car Company had been down to his place and made him a considerable lower price and offered to build him the identical truck of which we had sent down sample, and that as they were willing to build this truck at a lower price than we had taken the order for he felt at liberty to cancel the order, and that he would allow us to furnish twenty sets of the trucks at the same price quoted by the Seattle Car Company, and if we didn't*

want to do this he would have to give them the entire order."

Thereupon, in response to questions by the Court, the attorney for the defendants stated defendants were using trucks built by the Seattle Car and Foundry Company having one draw-bar of standard height and another below standard height.

"We filled part of the order furnishing twenty pairs of trucks; the price we gave Mr. Kerry on the original order of forty trucks was \$700 per set, and the price we were compelled to take on the twenty sets was \$625 a set, being a reduction of \$75; the twenty sets that we furnished cost us \$614 a set; I have seen the trucks furnished to the defendants by the Seattle Company, and they are similar to our truck, having high draw-bar and the low draw-bar. At the time Mr. Kerry informed me that he would have to place his order with the Seattle company, *I notified him verbally that this was my invention and afterwards notified him by letter* and he told me that he had secured a guaranty from the Seattle Car and Foundry Company against loss through infringement on our truck or any other; *the other companies did not furnish sample trucks with the high and low draw-bars,*

but furnished standard trucks, that is, with standard draw-bars at both ends; Mr. Kerry did not suggest this idea to me, nor did anyone else; I worked that out as a solution of difficulties which had been reported by our salesman; after getting the order from Mr. Kerry, and before receiving the notice of cancellation, we had ordered such parts as we did not already have in stock to fill the order for forty sets of trucks; Mr. Kerry knew that I had applied for a patent; I notified him before we had received the patent that we had applied for one, and also after the patent was issued; I notified him after receiving the formal notice of allowance of the application."

The letter from Mr. Kerry of November 14, 1914, to Mr. Chandler's company was introduced in evidence (R. 52), and is as follows:

"Clatskanie, Ore., Nov. 14, 1914.
Northwestern Equipment Co.,
Portland, Ore.
Gentlemen:

Some time in February, 1915, we will be in need of 40 sets of disconnected 100,000 capacity standard height logging trucks. We are asking the Seattle Car and Foundry Co., the Russell Car & Foundry Co. and yourselves to furnish one set of these trucks, each naming a

price delivered at Kerry, Ore., on the S. P. & S. We will buy one set of trucks but may not pay for them until we place the order for the balance. You may ship us one set whenever you have them ready.

Yours truly,

Columbia & Nehalem River R. R.,

By A. S. Kerry, President."

Be it remembered that Mr. Chandler had invented and worked out his new logging trucks to take care of difficulties which had been experienced by Clark & Wilson, and had notified them that he "*would in the future be prepared to furnish them with trucks having a draw-bar of standard height on one end and a draw-bar of considerable lower height on the other side.*" He accordingly writes Mr. Kerry on November 17, 1914, (R. 53), in part as follows:

"Nov. 17, 1914.

Mr. A. S. Kerry, President, Columbia &
Nehalem River R. R. Co., Westport,
Oregon. Logging Trucks.

Dear Sir:

We duly received your favor of November 14, and are glad to know that you are going to buy 40 sets of trucks.

We note that you want the draw-bar to be of standard height, that is, $34\frac{1}{2}$ inches from top of rail to center of draw-bar. In this connection, would say that Clark & Wilson found that where they

used the standard height coupler on their trucks and hauled very long logs the logs bellied down and interfered with the inside coupler, and *they told us that if they ordered any more trucks they would want us to furnish them a truck having the outside couplers of standard height and the inside couplers 10 inches lower.* I am making a sketch to explain more fully the point that I am trying to bring out, and if after thinking this over you decide that you would like to have us send you a set of trucks in which the couplers are of different heights, we would be glad to do it.

As long as you are getting three different types of truck, it might be a good idea to embody as many ideas as you could in the three sets and then make up your own design from the three and let everybody bid on them, as all of the manufacturers can build any type of truck which you desire."

Attention is called to the fact that in the body of Mr. Chandler's letter he refers to "types" of trucks. This, of course, refers to the general construction and arrangement of the frame and springs of the truck. This will be clear from the following paragraph of his letter in which he refers to "*arch bar truck*" and in which he also refers to a "*cast steel frame truck*."

Mr. Kerry replied November 21, 1914 (R. 55), as follows:

"Answering your favor of recent date in regard to logging truck. You are no doubt right about the inside draw-head. All of our disconnected cars will be used *for hauling long stuff and would be a failure if the log got on the draw-head.* We have asked the others to figure on automatic couplers which are to be provided with slot with link and pin."

This letter from Mr. Kerry clearly indicates that high and low draw-bars on a disconnected logging truck was a new idea to him, and his testimony very forcibly confirms this, for he says (R. 103):

"I don't think I ever suggested the idea of this high and low draw-bar before Mr. Chandler suggested it to me; that letter will indicate that I didn't, although I may have asked Mr. Clark; *Chandler told me about Clark & Wilson's difficulty in a conversation I had, and it may have been the results of our conversation that he wrote that letter. If Mr. Chandler said he told me that he had brought out the high and low draw-bar as a solution of difficulties which Clark & Wilson were having, I would believe it. I don't remember.*"

Mr. Chandler's testimony on cross examination simply confirms his direct testimony. On redirect

examination (R. 61), Mr. Chandler clearly distinguishes between disconnected logging trucks of the character here involved, and the construction of street-cars, flat-cars, freight-cars and passenger-cars, which defendants have brought into the record, first in their answer and then in the testimony of their witness, F. W. Chriswell, but who on cross examination says that (R. 89) :

*“ * * * in these cars there was no coupling or draw-heads on the inner ends of the trucks; they were connected by the beams or by the body of the flat-car; in the hobble skirt car there was no coupling or draw-head on the inner ends of the trucks; they were also connected by the body of the car; in all of these cars referred to in the dictionary the construction is the same, the trucks being connected by the bodies of the cars; the draw-heads are placed centrally of the car, longitudinally but not transversely.”*

And then on page 90 of the Record Mr. Chriswell further says:

“We have never built disconnected logging trucks with the high draw-bar at one end and the low draw-bar at the other until Mr. Kerry was in the market for them.”

And on page 91 he further says:

“Mr. Kerry informed us that he could get these trucks from the Northwestern Equipment Company with high and low

drazz-bars; at that time the sample trucks had already been furnished; I had seen them and thought they were a practical truck well designed for taking care of long logs, and IN ORDER TO GET THE ORDER we told Mr. Kerry that we could build him the same kind of truck."

MR. VAN CLEVE'S TESTIMONY (R. 61-63):

"I am fifty-four years of age, live at Elko, Nevada, and at the present time am master mechanic for the Western Pacific Railway; I was employed by the Northwestern Equipment Company of Portland, Oregon, as salesman from January 1st, 1913, to about December 1st, 1914; I called on the Clark & Wilson Lumber Company several times. The chief objects of these calls was to watch the service given by two sets of our logging trucks which the Clark & Wilson Lumber Company had purchased and was using. I talked with Ira Withrow. Until their purchase of our trial sets of logging trucks as well as two or more sets of other manufacture, they had been handling their logs entirely on flat cars with couplers of the Master Car Builders standard height; this made it necessary to give them a logging truck with a coupler of Master Car Builders height, so the logging trucks could be used in connection with the flat

cars. The Master Car Builders standard height of couplers is in the neighborhood of a foot as near as I can recall higher than the coupler of the ordinary logging truck. The Clark & Wilson Company was at this time making the practice of getting out and moving their logs in full lengths, and Mr. Withrow explained to me that these very long logs on account of their sagging down of their own weight, between the trucks, which were placed under either end of the log, were It was my practice to report any such troubles or difficulties to our Manager, giving trouble striking the inside coupler. Mr. Elbert G. Chandler. I reported to Mr. Elbert G. Chandler that the inside couplers of the Clark & Wilson Lumber Company's logging trucks were giving trouble by striking the long logs they were handling on account of these logs sagging down between the trucks. Mr. Chandler solved the troubles which I reported to him the Clark & Wilson Lumber Company was having with the high couplers on our logging trucks. On one of my trips I advised Mr. Withrow, the representative of the Clark & Wilson Lumber Company that I had reported this trouble to Mr. Chandler, and he had developed a truck with one high and one low coupler which would entirely do away

with this trouble. His reply to this information, as near as I can recall was, *'If you people can furnish that kind of a logging truck, that is the kind we want.'*"

DEFENDANT KERRY'S TESTIMONY (R. 94-104)

Mr. Kerry is president and manager of the Columbia and Nehalem River Railroad. On direct examination he says:

"I cannot remember exactly when this idea of the construction of a detached logging truck with one draw-bar higher than the other was first suggested to me; I think it was sometime in the Fall of 1914; my first intimation came to me, I think, from Mr. Clark; I am not positive about that; I mean Mr. Clark, of Clark & Wilson; I was casting around for logging trucks and made inquiry from Mr. Chandler, of the Northwestern Equipment Company, and Mr. Piggott, of the Seattle Car and Foundry Company, and Mr. Brown, of the Russell Car & Foundry Company."

Speaking of the difficulties experienced by the logs catching the draw-heads of cars then used, Mr. Kerry says (R. 95):

"I would not be positive about Mr. Clark having said to me that I should have the inner draw-bar lowered at that time, but I am under the impression that

he did; that was in the Fall of 1914; in sending out my written inquiries *I did not specify the high and low draw bars."*

It would seem certain that Mr. Kerry would have specified in his letter of November 14, 1914 (R. 52), asking for samples, that the samples should have standard height draw-bars on their outer ends and low draw-bars on their inner ends, if he had known of it. His reply (R. 55), to Mr. Chandler's letter suggesting this construction, establishes the fact that it was a new idea to him.

Testifying in regard to Chandler's sample cars, Mr. Kerry says (R. 96):

"Mr. Chandler's car came and *it was just exactly what we wanted*; the inside draw-head was sufficiently low to haul these long logs, and the outer draw-head was standard to connect with standard coupling; this was the sample set of trucks furnished by Mr. Chandler received about the same time that I received one from Seattle; I think Mr. Chandler's came a little ahead of the Seattle truck. *The Seattle car had both draw-heads the same height*, and the Chandler car had one low and one high; this was probably in February, perhaps in January, 1915; it was some time after that, probably in February, that *I gave the order for the forty cars."*

Testifying in regard to the price made by Mr. Chandler, Mr. Kerry says (R. 97):

" * * * the price was *so attractive* that I made up my mind that I would take the new stuff and discard the old; the original bid these three different concerns made was for a 100,000 capacity and not for 60; Mr. Chandler talked to me, and *I practically gave him the order*; he was to consult with his superiors and let me know in a day or two, but just before leaving the office he said, 'We will furnish them, I am sure of that.' That order was for cars with one draw-head low and the other high, new 60,000 capacity cars."

Seattle Car Company's Representative Calls on Mr. Kerry (R. 97-98).

"Within forty-eight hours afterwards the Seattle Car Company's representatives called on me and insisted they had not been given a fair deal because they had not had an opportunity to bid on a 60,000 capacity car, and they didn't think, in justice to them, we should award the contract to Mr. Chandler; that they should at least have half of the cars, and they made me a price that was *still a little better* than the price that was made by Mr. Chandler, and *I divided the order*. I telegraphed Mr. Chandler and told him, under the circumstances I thought it was

my duty to divide the order; *I gave Mr. Chandler one-half of the order and the other half to the Seattle Company; they were to construct their cars with a low draw-head on the inside.*" Chandler's invention copied.

Referring to the cancellation of the order given by Mr. Kerry to Mr. Chandler and the agreement of the Seattle Car and Foundry Company to build the trucks according to the sample of Mr. Chandler's new truck with high and low draw-bars, Mr. Kerry says (R. 98-99):

"I could not give you *the date* when he (Chandler) first notified me that he claimed the exclusive patent right to this type of cars, but *he notified me that he was going to sue us on account of the infringement of his patent by the Seattle Car & Foundry Company—that he had taken a patent on that car—and I immediately got a bond from the Seattle Car Company to protect me in these patent rights; also from Mr. Chandler; I could not tell without looking up my records how long this was after I gave the order.*"

On cross examination Mr. Kerry, referring to his letter of November 14, 1914, above referred to (R. 52), testified as follows (R. 99-103):

"That letter is similar to the ones which I sent these three different companies, notifying them that I was in the market

for cars; practically the same was sent to all of them—I think exactly the same. I can not remember when Mr. Chandler wrote me in reply to this letter that he could furnish a logging truck with high and low draw-bars, but I think he told me because Mr. Chandler was very resourceful in things of that kind. He was giving information all the time; we had several conversations about it; I am quite sure that I received the letter of which Complainant's Exhibit 3 is a carbon copy, and in reply I wrote the letter marked "Complainant's Exhibit 4;" I do not think that this letter was the first time the idea of a logging truck having a high draw-bar at one end and a low draw-bar at the other was brought to my attention; he says, "They (Clark & Wilson) told us that if they ordered any more trucks they would want us to furnish them a truck having the outside couplers of standard height and the inside couplers ten inches lower."

* * *

"Mr. Clark did not say anything how the idea of a high and low draw-bar was brought to his attention."

* * *

"I think I mentioned to all of these gentlemen that the trucks would have to give a certain clearance, and they were figuring on eleven inches of clearance,

and *I expected to leave that to their ingenuity as to how they would arrive at it.*"

* * *

"Our outer coupling had to be standard height and the point I had in mind was a certain distance between the top of the bunk and the coupler to be given either by raising the bunk or lowering the draw-head, or any way they had in mind to figure it out; I don't remember all my conversation with the different companies, but I think probably I discussed that point with most of them; anyway, *I am sure I discussed it after Mr. Chandler and myself talked it over; Mr. Chandler was the first to definitely bring to my attention a plan of that kind; and he told me they could work it out and make a success of it; that was the sample he furnished me, and it was very satisfactory; the samples furnished by other companies were of standard height; the Russell Company did not have an opportunity to furnish me a high and low draw-bar; they brought one down there and tried to reconstruct that one, but could not.* * * *

"I think the price per set at which Mr. Chandler offered to furnish his trucks was \$725, for the pair of trucks; I think \$625 was the price made by the Seattle Company; I divided the order and gave

the Seattle Company an order for twenty trucks and Mr. Chandler an order for twenty; *The Seattle Company furnished me twenty sets of trucks similar to the ones furnishd by Mr. Chandler, and I am using them and they are all satisfactory; before that I had never seen or heard of any logging trucks of that kind; I was in the logging business about thirty years; it was quite a radical departure from anything of the kind made before; it was quite a difficult problem always to haul long logs without having them to interfere, and we had lots of difficulty; going around the curve the draw-bar would hit the logs and tip the car over or throw it off the track; these trucks with a high and low draw-bar was a very clever solution of the problem. I don't know how we would get along without it in the present system of logging. * * ** The particular feature which we wished in both logging trucks was the high draw-bar and the low draw-bar; we simply had to have it or we could not log the way we were going to log; we would either have to use a separate draw-bar, what we called raisers, to connect with foreign equipment, or we would have to have the high draw-head on the outside, otherwise our equipment would not connect with the S. P. & S. equipment; *I don't think I ever*

suggested the idea of this high and low draw-bar before Mr. Chandler suggested it to me; that letter will indicate that I didn't, although I may have asked Mr. Clark; Chandler told me about Clark & Wilson's difficulty in a conversation I had, and it may have been the results of our conversation that he wrote that letter. If Mr. Chandler said he told me that he had brought out the high and low draw-bar as a solution of difficulties which Clark & Wilson were having, I would believe it. I don't remember.

RE-CROSS EXAMINATION OF MR. KERRY
(R. 103-104).

"Upon re-cross examination the witness testified that if he did not have one high draw-bar and one low he would be put to a great deal of inconvenience in hauling these logging trucks with standard equipment; that his road is a common carrier road and will do a lot of business besides logging business; that an ordinary logging road would not need the high and low draw-head because there is some little objection to it; that if the two cars forming a set get separated they must come together; you cannot take the half of one car and use it with the same half of another car, and as a result, you occasionally have two cars laid up when you

might have one if they were all low; if the draw-heads were all the same you could switch them around and use one-half of the car with half of another, while with the different heights of draw-bars all the cars must be together—each is a pair and inseparable. If we wanted to, we could couple a pair between every other flat car or every other box car or every other passenger car, of standard equipment.”

MR. IRA L. WITHROW'S TESTIMONY.

Mr. Withrow's testimony, we submit, helps to establish the following facts: The difficulties which the logging companies were experiencing in trying to haul *very long* logs; the merit in the idea of a disconnected logging truck having a high draw-bar at one end and a low draw-bar at its other end, whereby two of them can be used together as a unit; *that no one connected with this case, other than Mr. Chandler, ever gave any thought or made any sketches in an endeavor to embody the invention in a practical and usable form.*

Mr. Withrow testifies (R. 63) as follows:

“I remember the occasion when the Northwestern Equipment Company, and certain other companies, furnished Clark & Wilson some sample logging trucks along about the Fall of 1913 * * * ; we were hauling long logs at that time and *we experienced difficulty by reason of the interference of these long logs with the in*

*ner draw-bars of these trucks; * * * I had a conversation with Mr. Van Cleve, the salesman of the Northwestern Equipment Company, regarding that question; he was there one day and we were having trouble with the trucks, and I told him he would have to do something and that the proper way to do would be to drop the draw-bars, and he said that as we had the standard coupler flat-cars on the outside—he looked it over and thought it would be a good idea.”*

CROSS EXAMINATION OF MR. WITHROW (R. 65).

While Mr. Withrow claims to have suggested the idea of the high and low draw-bar, he says:

“I never made any sketches of it; I just told him it could be done; we were looking at the trucks one day there—there was no way decided on how it should be done; I am quite positive that that idea came from me, and I suggested it to Mr. Van Cleve.”

He also testifies:

“We said that we wouldn’t buy any more unless this was done; that we would order no more trucks without the inside draw-bar being lowered; we never bought any after that; we had these ordered at the time this came up with the standard

draw-bar at both ends; the cars were delivered probably *three or four months after that, but we didn't have this idea embodied in them because they were ordered before this question came up*; they were ordered from the Seattle people *with the standard draw-bar at each end; we never wrote them to see whether it would be possible for them to change; we never had any logging trucks with draw-bars arranged one high and one low; we never have ordered any trucks since that time; the Seattle trucks which were furnished us had the standard draw-bar at both ends*; I talked about this idea with Mr. Vachon of the Seattle Car and Foundry Company one day during his visits down there; *it was some time last Summer that I first learned that the Northwestern Equipment Company was furnishing logging trucks with high and low draw-bars; I think it was Mr. Clark who called it to my attention; we never ordered any trucks from the Northwestern Equipment Company except the two sets we got on trial there*; the suggestion that these trucks could be made with high and low draw-bars was made when Mr. Van Cleve and I were talking about it that day; *I do not remember that Mr. Van Cleve called on me afterwards and told me that they were in a position to furnish us*

trucks having high and low draw-bars; he called on us quite frequently at first to see how the trucks worked; we had his trucks against the Seattle people's trucks and the Russell trucks, and I notified him that we were having this difficulty with all trucks—the long logs interfering with the draw-bars; that was a common objection with all logging trucks having a standard height; we never used the low trucks; I told the Seattle Company it would be a good idea to have trucks built that way to lower the draw-bars; I told them that along in the Spring of 1914, I could not say just when, but it was during some of their calls; we just talked about it, that it should be done on account of the long logs sagging; we are hauling long logs at the present time and still using trucks with both high draw-bars; we find we have trouble on account of interference by the logs, but we are getting along with the ordinary high trucks with high draw-bars; we have had accidents caused by the logs sagging down on the draw-bar, but have not taken any steps to have the trucks reconstructed by lowering the draw-bars, but if we ever ordered any more trucks we would order them with the low draw-bar at one end; this would require considerable reconstruction on a car of THIS TYPE after they are already built.”

"I didn't suggest any way of doing that no more than just dropping the draw-bar, after I talked with Mr. Van Cleve about it I took it up with the Seattle Car Company; it was along about the time we talked about it—there was nothing said in the order—the order was in; it was about three months after this conversation with Mr. Van Cleve that we received the order from the Seattle Company; we didn't take up with them the question of making those trucks with the low draw-bar; the order had been placed and we let it pass; we have no trucks with the low draw-bar."

It seems very strange if Mr. Withrow knew about the high and low draw-bar idea at the time they were experiencing so much difficulty with long logs and with an order for other logging trucks placed with the Seattle Car & Foundry Company, that no steps were taken to see if these trucks which were being made could not be changed, or so constructed as to embody the improved idea of the high and low draw-bar. He says the trucks were not delivered for three months or four months afterwards. Mr. Van Cleve and Mr. Chandler both very definitely testify to the fact that *the difficulty only* had been discussed, and that the idea of the high and low draw-bar was not suggested until Mr. Chandler in his study of the problem of solving the difficulty "*hit on the idea*" of lowering one of the draw-bars on each truck and then using them in pairs with

the low draw-bars therebetween and the high draw-bars at their outer ends.

MR. F. W. CHRISWELL'S TESTIMONY (R. 81-94)

Mr. Chriswell is engineer for the Seattle Car and Foundry Company, the company which, after seeing Mr. Chandler's sample truck, offered to build the same kind of a truck for less money in order to get the order from Mr. Kerry. He says:

"My company constructed for the Columbia and Nehalem Railroad twenty logging trucks having one draw-bar higher than the other; * * *

"March 16, 1914, I was at the camp of the Clark & Wilson Company with Mr. Vachon and Mr. W. W. Clark. We met Mr. Withrow there and they had various trucks in service, the Northwestern, our trucks and the Russell trucks, and we were discussing the merits of the trucks and Mr. Withrow called attention to the fact that the sagging of the logs interfered with the coupling, and said in order to make them serviceable for hauling long logs the inner draw-bar would have to be lowered; he offered no suggestion how it could be done."

Attention is called to the fact that this visit of Mr. Chriswell to the camp of Clark & Wilson Company, March 16, 1914, was after the dealings of Mr. Chandler

and Mr. Van Cleve with the Clark & Wilson Company, which was in the Fall of 1913 (R. 47). Mr. Chriswell further testifies that:

"This question of the high and low draw-bars next arose when Mr. Kerry was in the market for trucks and our General Manager was down there at Mr. Kerry's camp; when he returned he told me that *we would have to build Mr. Kerry's trucks in that way* (he had seen Mr. Chandler's sample). I explained to him at the same time that this sample truck—*it would be difficult to make the change at that time*; it would involve pattern changes and would make a delay in delivering the truck, so he said he would furnish the trucks just as they are, and *if we get the order then we can make the change* * * * (R. 83); between the time we commenced manufacturing these trucks and the time that I learned of the application of Mr. Chandler for a patent I was out at the plant of the Northwestern Equipment Company and met Mr. O'Brien, their superintendent; I believe this was in the early part of April; *they were building Mr. Kerry's trucks at that time*, and Mr. O'Brien asked me, 'Are your trucks just like these?' I said, 'Virtually the same. There may be a few details, but in *type* they are the same thing as your trucks.' We were referring then

to the trucks with high and low draw-bars; he did not at that time inform me that Mr. Chandler, or his company, made any exclusive claim to the right to manufacture such trucks * * * ; Mr. Chandler was in our office with two of the Twohys, and we discussed the trucks and the price, but nothing was said during the conversation about patent or anything of that kind then; this was in our office at Seattle; we didn't show them the kind of trucks we were making; I can't say positively whether or not I showed him the drawing, but I don't suppose I did; I don't know that anything was mentioned regarding the high and low draw-bar; I can not say positively whether Mr. Chandler knew at that time that we were making trucks with high and low draw-bar, only the fact that he knew they were similar."

Court: "You didn't intend then to divulge to him that you were making such trucks?"

"It was not that we didn't wish to divulge to him that we were making these trucks, but simply it *didn't occur* to us that there was anything patentable in the idea, or that there was any question about that; it was common practice to make *cars* with high and low draw-bars."

Mr. Chriswell then gives a great deal of testimony regarding the general construction of cars, such as flat-cars, street-cars, passenger-cars, and even locomotive couplers, in an endeavor to confuse trucks constructed for use on flat-cars, street-cars, passenger-cars, and the like, in which the trucks are connected by the body of the car, and in which the couplers are placed, not upon the trucks, but into the opposite ends of the car bodies under which the trucks are mounted. This testimony, however, is not pertinent to the issue of this case, for Mr. Chriswell himself has to admit on cross examination that all of this testimony refers to car construction and not to disconnected logging truck construction.

On cross examination (R. 89), Mr. Chriswell admits that the cars

“which they constructed in 1910, were flat-cars, and one was a logging *connected truck connected by continuous timbers*; they were cars made up in permanent forms with trucks at the opposite ends which were connected together by the bodies of the cars * * * ; in these cars there was no coupling or draw-heads on the inner ends of the trucks; they were connected by the beams or by the body of the flat-car; in the hobble skirt car there was no coupling or draw-head on the inner ends of the trucks; they were also connected by the body of the car; in all of

these cars referred to in the dictionary the construction is the same, the trucks being connected by the bodies of the cars * * * (R. 90); *we have never built disconnected logging trucks with the high draw-bar at one end and the low draw-bar at the other until Mr. Kerry was in the market for them * * **; I didn't see Mr. Kerry myself, but our general manager told me he spoke to Mr. Kerry about constructing a truck with the high and low draw-bar; *it was not a common practice, and I didn't wish to introduce anything that was out of the ordinary in the line of construction*; we wanted to avoid multiplicity of designs and patterns as much as we could. *It was a departure*; I didn't have any conversation with Mr. Kerry; *Mr. Kerry informed us that he could get these trucks from the Northwestern Equipment Company with high and low draw-bars; at that time the sample trucks had already been furnished; I had seen them and thought they were a practical truck well designed for taking care of long logs, and in order to get the order we told Mr. Kerry that we could build him the same kind of truck * * *;* we furnished twenty logging trucks to Mr. Kerry with the high and low draw-bars."

MR. E. V. VACHON'S TESTIMONY (R. 104).

Mr. Vachon is also a representative of the Seattle Car & Foundry Company. Regarding the question of the high and low draw-bar and a discussion between Mr. Chriswell and Mr. Withrow, he says:

"I don't remember just the conversation, but the substance of it was that some arrangement should be made to provide for that, and the practical way seemed to be to lower the couplers on the inside so that they would not interfere, causing accidents or anything of that kind.

On cross examination Mr. Vachon's memory was not very good. He says:

"Mr. Withrow suggested that this lowering of the couplers on the inside was the practical way; I do not remember his exact words; it was just to the effect that the coupler should be lowered at the inside to take care of that; he thought that was the practical way of obviating the difficulty; this was in the early part of 1914; he did not suggest any way of doing it, he didn't go into the technical part; he suggested that it might be the practical way, as I remember his suggestion—it would be the practical way, or something to that effect, I don't just remember the words; I don't think he suggested any

other solution; *I do not remember* that he made any statement that the Northwestern Equipment Company could build that kind of a car."

It is to be noted that all of these various conversations between Withrow, Chriswell and Vachon were subsequent to the Fall of 1913, when the difficulty of handling long logs was first experienced by the Clark & Wilson Company in connection with trial trucks which it was using. There can be no question about the first suggestion of the high and low draw-bars on a disconnected logging truck coming from Mr. Chandler, who was the first, not only to conceive the idea, *but he was the first to reduce that idea to practice.* The Seattle Company copied it.

The attention of this Honorable Court is especially called to the fact that defendants below, though claiming to have made "suggestions" of the idea involved in this case, *never made any attempt whatever to reduce the idea to practice until after they had seen Mr. Chandler's sample trucks on which, in competition with their sample trucks having draw-bars at the same height, the order was first given to Chandler.* Referring on this point again to the opinion of the court below, he says (R. 32):

"The question has been argued here as to who first suggested this change in the apparatus which finally brought about the issuance of the patent. There is some

question in the testimony as to whether the idea was first suggested by Mr. Chandler, or whether by Mr. Withrow. Mr. Withrow claims that he made the suggestion in the first place. Mr. Chandler thinks that he was the first one to suggest it, or that the idea came to him first. Mr. Chandler is corroborated by the testimony of Mr. Van Cleve very pointedly. But, taking into consideration the testimony that *Mr. Chandler entered at once upon the completion of his design, so as to put it into proper arrangement for use, and that Mr. Withrow allowed the matter to rest and made no effort toward a completed design for useful purpose, and taking into consideration also the other testimony in the case, that, after Mr. Chandler had perfected his design, constructed a car, and supplied one of those cars to the defendant company, then the Seattle Company, seeing that design, offered to make a car of the same design and to sell it to the defendant company, I think the question resolves itself very satisfactorily in favor of Mr. Chandler's being the originator of the idea, to say nothing of the matter of reducing it to practice."*

Referring now to the Magor Patent No. 951,253 (R. 72), this is the patent which the Patent Office at

first thought might anticipate Chandler's idea. By reference to Fig. 5, however, of the drawing, it will be clearly seen that these draw-heads S—S, are at the same height and are in direct alignment with each other. The line of draft is direct. The reasons why this Magor patent did not anticipate Chandler's idea are set forth in attorney's argument to the Patent Office (R. 68-70), which explanation was entirely satisfactory to the Patent Office experts, for the patent was thereupon issued.

A study of the specification and claims of this Magor patent, will convince the court that here, too, is a patent for a seemingly simple improvement, but one which overcomes difficulties and operates with greater safety. Claim 3, for example, is as follows:

“In a car truck, the combination of a bunk to receive the load, and draft rigging pivoted thereto.”

But, as said in *Pettibone v. Pennsylvania Steel Co.*, 133 Fed. Rep. 730 (737):

“He was the first to so arrange this old and well-known piece of machinery to bring the result required. The changes made were slight, and apparently of not very great importance in each particular piece, but when combined by Strom the very slight change made in each one of the parts where change is found, resulted in effecting a result which is shown to have been unknown and not accomplished by any other before the patentee.

There are numerous cases supporting inventions of this kind. It is only necessary, in support of this patent as against those cited as anticipations, to refer to *Brill v. Third Ave. R. R. Co.* (C. C.), 103 Fed. 289."

The Komarek Patent, No. 1,008,921 (R. 75), was also considered by the court below, but was held not to anticipate Chandler's idea. The object of the invention covered by this patent "is to provide a log truck of simple construction which can be manufactured at a low cost." Why? "Because it consists of a *one-piece cast* metal frame having draft beams formed integral with the bolster and the front end sill of the truck." (Lines 94-99). The claims most forcibly define the object of this simple invention. Claim 1 specifies: "A log truck having a cast metal frame which consists of side sills, end sills, a bolster, and draft beams *all integrally connected together*, and pedestals secured to the side sills."

The construction of this Komarek truck clearly shows that there was no thought of having a draw-bar, or coupler, on the inner end of the frame. The inner frame is light and would not carry a coupler. This is very clearly indicated by reference to Fig. 1 of his drawings. There are lots of truck frames made lighter and lower on their inner ends. As a matter of fact, however, the front and rear end sills C and D are of the same height in this Komarek patent and are formed integrally to the side sills B. This will be un-

derstood by reference to Figs. 1 and 2. Only the middle draft sill E, which is of box-like construction, is higher than the end and side sills C, D and B—B. Fig. 2, it will be noted, is a sectional view taken on line 2—2 of Fig. 1. This patent only goes to prove that at the time of the Komarek patent it was not known to construct a log truck having a high draw-bar at one end and a low draw-bar at the other.

Would appellants also try to destroy this patent because it covers a simple idea; the idea of certain parts being "*integrally connected*" in a simply and improved construction, whereby it "*can be manufactured at a low cost?*"

The Bettendorf Patent does not refer to logging trucks at all, but to railroad car trucks and particularly to the trucks or cars from which the body may be readily lifted or tilted to one side or the other while supported thereby. The description and the claims of this patent clearly show that this is "*a cast metal truck-frame for car-trucks extending from axle to axle and from wheel to wheel.*" It is not even so constructed that an inner draw-bar or coupler could be made as a part thereof without reconstruction. It could not be used for logging. There is no suggestion of a pair of disconnected logging trucks with co-operating low draw-bars therebetween and high draw-bars at their outer ends.

We have never known a case in which the facts and circumstances and equities were so completely in favor of the complainants below. THINK OF IT. The Seattle Car Company had furnished a sample truck in

competition with Mr. Chandler's company, and with the Russell Car and Foundry Company. Chandler got the order, then within forty-eight hours the Seattle Car Company came in, after inspecting Chandler's new sample truck (R. 50, and Kerry's testimony bottom pages 97-98), and offered to copy Chandler's new truck, and to furnish it for less money than Mr. Chandler's price.

THE LAW.

Defendants have endeavored to discredit the fact that Chandler's improved logging trucks involved invention, because the parts used in the combination, by themselves are old, and they have gone to the limit in picking to pieces the various elements involved in the combination and showing that the function of each is old. But, as stated in *Columbus v. Robbins*, 64 Fed. 384; 12 C. C. A. 174:

"Notwithstanding that fact that all the parts are old, in the sense that each of them may be found in previous patents, the combination of parts in the patent in suit brings about a new result, and involves patentable invention."

See also *Brown v. Guild*, 90 U. S. 181.

Again, in *National v. Interchangeable*, 106 Fed. 693; 45 C. C. A. 544, the court says:

"A new combination of old elements whereby a new and useful result is produced, or *an old result is attained in a more facile, economical and efficient way*, may be protected by a patent as

securely as a new machine or composition of matter." Citing—

Seymour v. Osborne, 11 Wall. 516;

Gould v. Rees, 15 Wall. 187;

Thompson v. Bank, 53 Fed. 250.

In *International v. Dey*, 142 Fed. 736; 74 C. C. A. 68, we have:

"Strictly speaking the combinations are not, as we have seen, of old elements, but *conceding that the elements are all old*, it cannot be denied we think that the combination is not only new but *that it produces a new result, or, at least, an old result in a better way than any device which preceded it*. The elements of the combination so act that each qualifies every other and the new result is due to their co-operative action. Remove one and the machine becomes inoperative; it fails to produce the desired result.

After careful consideration, we are of the opinion that the complainant's patent relates to an article of substantial, practical merit, which excels in operation and results other existing appliances, and that the patent is valid."

Diamond v. Goldie, 84 Fed. 972; 28 C. C. A. 589.

"That putting a part in a secure place and out of the way may involve invention."

Stanard v. Computing, 126 Fed. 639; 61 C. C. A. 541.

Star v. General, 111 Fed. 398.

Cutler-Hammer v. Automatic, 159 Fed. 447; 86 C. C. A. 477.

Ninth Circuit.

In the case of Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280; 97 C. C. A. 446, this Honorable Court held:

“A device which does not operate on the same principle as that of a patent cannot be an anticipation.” Citing—

Western Electric Co. v. Home Telephone Co., 85 Fed. 649;

Dederick v. Cossell, 9 Fed. 506;

Pattee v. Moline Plow Co., 9 Fed. 821;

Fuller v. Yentzer, 94 U. S. 288;

Topliff v. Topliff, 145 U. S. 156.

“It is not sufficient, to constitute an anticipation, that the devices relied upon might, by a process of modification, reorganization, or combination be made to accomplish the function performed by the device of the patent sued on.”

Authority *supra*.

Then in the case of Bliss et al v. Spangler, 217 Fed. Rep. 394, this court held:

“It has long since been settled that an aggregation and association of altogether old elements may constitute invention, if it escapes or rises above mere mechanical skill and produces utility

of superior virtue of that previously obtained." Loom Co. v. Higgins, 105 U. S. 580.

"It may happen that a single change in construction is productive of a marked advancement in utility, and this has been accounted novelty appertaining to invention. Citing 'The Barbed Wire Patent, 143 U. S. 275: * * * "It is hardly probable that complainant's device, constructed and articulated as it is, is the result of mere mechanical suggestion. It is manifestly not a contrivance that the ordinary mechanic would devise in the application of known elements. Otherwise, why was it not struck upon before?"

Morton v. Llewellyn, 164 Fed. 692.

In the famous Grant Rubber 'Tire case - Diamond Rubber Co. v. Consolidated Rubber Co., 120 U. S. 428, the following is held:

"It was certainly not an exact repetition of the prior art. It attained an end not attained by anything in the prior art, and has been accepted as the termination of the struggle for a completely successful tire. It possesses such amount of change from the prior art as to have received the appropal of the Patent Office, and is entitled to the presumption of invention which attaches to a patent. *Its simplicity should not blind us as to its character.* Many things, and the patent law abounds in illustrations, *seem obvious after they have been done*, and 'in the light of the ac-

complished result,' it is often a matter of wonder how they so long 'eluded the search of the discoverer and set at defiance the speculations of inventive genius.' *Pearl v. Ocean Mills*, 11 Off. Gaz. 2.

"Knowledge after the event is always easy and problems once solved present no difficulties; indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by merely skillful attention. But the law has other tests of the invention than subtle conjectures of what might have been seen and yet was not." *Railroad Co. v. Sayles*, 97 U. S. 554.

In *Barry et al v. Harpoon Castor Mfg. Co.*, 209 Fed. Rep. 207 (200), the court, after referring briefly to numerous decisions upholding patentability in seemingly simple inventions, says:

"In each of these cases the invention was based upon a finding of a new use or function for structures found in the prior art. Domes, torsional springs, stays for box corners, pasting machines, collar buttons, and barbs for fence wire were all old, but those who found a new place for the old devices whereby alone, or in combination with other structures, entirely new results were produced, received the rewards of the inventor. * * * It is most unsafe to refuse to

recognize invention because the device or combination is simple, for such a rule would destroy some of the most meritorious patents ever issued."

In *Johnson v. Forty-Second St. R. R. Co.*, 33 Fed. Rep. 499 (501), the court says:

"In judging of the invention care should be taken not to underestimate its value, because the apparatus, now that we have seen it work, seems so plain and simple. The test to which this patent has been subjected—the test which is usually applied to all contested patents—is certainly severe, and is even misleading and deceptive. The defendant assembles every similar device, description, or suggestion in the prior art not only, but also in analogous, and even remote arts. Everything which has the least bearing upon the subject is brought in and arranged by a skillful expert in an order of evolution which resembles most closely the invention which is the subject of attack. *Having thus reached a point where but a single step, perhaps, is necessary to success, and knowing from the inventor exactly what that step is, the expert is asked if the patent discloses invention, and honestly, no doubt, answers in the negative. There is always the danger, unless care is taken to divest the mind of the idea added to the art by the inventor, that the invention will be viewed and condemned in the light of ascertained facts.* With his descrip-

tion for a guide, it is an easy task to trace the steps from the aggregation to the invention."

"It may be true that Anderson has only taken the familiar contact spring or brush, and placed it in a protected position, but this change seems to have made the difference between a defective mechanism and a practical method of attaining the desired result. Where, as in this case, the departure from former means is only small, yet the change is important, *the doubt as to whether the inventive faculty has been exercised is to be weighed in view of the fact that the device in question has displaced others which had previously been employed for analogous uses, and this may decide the issue in favor of invention.*" *Star v. General*, 111 Fed. 398; 49 C. C. A. 409, citing—

Krementz v. Cottle, 148 U. S. 556;

Consolidated v. Detroit, 47 Fed. 894.

In *O'Rourke Engineering Construction Co. v. McMullen*, 160 Fed. Rep. 933 (938), the court says:

"The principal question in such cases is: Has the patentee added anything of value to the sum of human knowledge, has he made the world's work easier, cheaper and safer, would the return to the prior art be a retrogression? When the court has answered this question, or these questions, in the affirmative, the effort should be to

give the inventor the just reward of the contribution he has made. The effort should increase in proportion as the contribution is valuable. Where the court has to deal with a device which has achieved undisputed success and accomplishes a result never attained before, which is new, useful and in large demand, it is generally safe to conclude that the man who made it is an inventor. The court may resort to strict and, it may even be, to harsh construction when the patentee has done nothing more than make a trivial improvement upon a well-known structure which produces no new result, but it should be correspondingly liberal when convinced that the patentee's improvement is so radical as to put the old methods out of action. The courts have frequently held that one who takes an old machine and by a few, even inconsequential changes compels it to perform a new function and do important work which no one before ever dreamed it capable of performing, is entitled to rank as an inventor." Citing *Hobbs v. Beach*, 180 U. S. 383; also *Loom Co. v. Higgins*, 105 U. S. 580, and quoting from page 591 as follows:

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention. It certainly was a new and useful result to make a loom produce 50 yards a day when it never be-

fore had produced more than 40."

Then at page 939 the court says:

"The keynote of all the decisions is the extent of the benefit conferred upon mankind. Where the court has determined that this benefit is valuable and extensive it will, we think, be difficult to find a well considered case where the patent has been overthrown on the ground of non-patentability."

In *Candy et al v. Michigan Malleable Iron Co.*, 124 Fed. Rep. 486 (493), the court says:

"We have examined the other patents shown in the record sufficient to satisfy ourselves that there is nothing else which comes nearer to the claim in the Candy Patent we are now considering than those we have enumerated. It must be admitted that, if there were no other consideration, some of the previous patents might raise grave doubt in respect to the novelty of this invention. But in aid of it stand several facts which are always persuasive in such a case. There is the presumption arising from the granting of the patent, which, in this case, was issued, as the proceedings in the Patent Office show, after full and critical examination, and this after rejections and references to previous patents of a character very similar to those we have in the present record—indeed, some of them are the same. The invention has gone into extensive use."

The invention in this case relates to the attachment at the inner end of the draw-bar in railroad cars whereby the construction is made between the draw-bar and a draught timber.

In *Miehle Printing Press & Mfg. Co. v. Whitlock Printing Press & Mfg. Co.*, 223 Fed. Rep. 647, the Circuit Court of Appeals, Second Circuit, holds that "patentable novelty" is sometimes found in discovering what is the difficulty with an existing structure, and what change in its elements will correct the difficulty, even though the means for introducing that element into the combination are old, and their adaptation to the new purpose involves no patentable novelty.

The gist of the invention, as the patentee states, consists essentially in the use of a plane-faced actuating-block and means for maintaining it in proper position relative to the devices with which it intermittently co-operates.

Referring to the Miehle press, the court states:

"Miehle's stud was round and had a cylindrical sleeve on it to reduce friction. This had defects; or perhaps, as it may better be expressed, it was not as efficient as it might be * * * .

Hodgman, while retaining the Miehle stud with its two guideways and a flight through the air between one guideway and the other, has substituted for the cylindrical sleeve a square side block, presenting long parallel sides to travel in contact with the walls of the guideways * * * We

do not understand that any one contends that the Miehle press is not at all improved by the use of a square-sided block; certainly defendant, which uses such a block, cannot so contend * * * .

The defendant contends that it was "obvious" that the frictional roller of Miehle did not provide satisfactory wearing surfaces; that it was "obvious" that this was a defect which should be eliminated; that it was "obvious" that it would be eliminated if a square-sided block were substituted for the roller, the stud and guide-ways remaining substantially the same as before.

If this be so then Judge Mayer was correct, and it is not necessary to add anything to his discussion of the mechanics of the case, because the only thing left for Hodgman to do with these "obvious" suggestions before him would be to secure right-side-up position for his squared block and two well-known mechanical devices (the "planetary gear" and the "parallel links") were available to secure it, given the appreciation of the defect and the realization that the square-sided block would remedy it, the details of the structure would seem to be within the range of the ordinary skilled mechanic, who would use either the planetary gear, as Hodgman did, or the parallel links, as defendant does.

We must admit that, looking at the situation as laymen, unskilled in mechanics, and enlightened by the situation as it is after the event, we would be inclined to agree with defendant in its statement of what was *obvious* before Hodgman

appeared. But in our opinion the record does not indicate that this is all there is to Hodgman's improvement. Past experience has shown us that what may seem *obvious* after disclosure was not *obvious* before, even to persons skilled in the art." Brunswick Balke Co. v. Thum, 111 Fed. 904, 50 C. C. A. 61; Schenck v. Singer Mfg. Co., 77 Fed. 841, 23 C. C. A. 494.

The record indicates, as it did in the cases of the sewing machine treadle and the bowling alley ball return way, that there is something about the improvement of Hodgman which marks it as an expedient—simple, no doubt—but not naturally suggesting itself to the man skilled in the art."

"In Brunswick-Balke-Collender Co. v. Thum et al, 111 Fed. Rep. 904, the Reisky Patent Number 599,477 for improvements in Bowling Apparatus, which consists of a run-way or trough for the return of the balls, so constructed that the balls roll rapidly down the incline until near the players' end of the alley, and then up an ascending incline which gradually checks their momentum, breaks the force of their impact and prevents their injury, while apparently embodying only an *obvious mechanical expedient*, must be conceded patentable invention, in view of evidence showing that for many years mechanics had been engaged in attempts to improve the old style run-way to obviate the same defect, but

that the patentee was the first to use the double incline for the purpose, and that his invention at once came into general use.

“The facts in the case at bar are closely analagous to those which were before this court in *Schenck v. Singer Mfg. Co.*, 23 C. C. A. 494; 77 F. R. 841. The improvement consists in an extremely simple, and it would seem, perfectly obvious, application of common knowledge as to the law of gravitation. Were there nothing in the record but the bare statement of facts, above set forth, we would be inclined to concur with the court below in the proposition that:

‘Had any skilled mechanic been asked to perfect a structure that should gradually arrest the momentum of the returning ball, an ascent would obviously have been the structure needed.’

But in this case, as in the *Singer* case, the evidence shows conclusively, and, indeed, without contradiction, that this very demand for an arrester of the returning balls was before skilled mechanics for many years, and yet none before Reisky hit upon the device which now seems so obvious. The defects of the old system were serious * * *.

-
- In *Singer Mfg. Co. v. Schenck*, 68 Fed. Rep. 191, a simple invention held valid and infringed. Evidence of prior use 30 years ago not considered good.

"The burden of establishing this defense rests heavily upon the defendant: it must be proved beyond a reasonable doubt. The wisdom of this Rule was never more apparent than in the present case. The difficulty, if not the impossibility, of procuring accurate oral testimony regarding commonplace evidence occurring 30 years ago is obvious to all."

Affirmed in 77 Fed. Rep. 841. Holding that the improvements in Band Wheel Bearings for Sewing Machines, show patentable invention as to claims 1 and 2, notwithstanding the apparently simple connection of the change made, in view of the beneficial results achieved and the obvious defects of prior constructions.

In *Wickelman v. A. B. Dick Co.*, 88 Fed. Rep. 264 (260), the court says:

"The case is one for the application of the doctrine, well settled in the law of patents, that novelty is not negated by a prior accident production of the said thing, when the operator does not recognize the means by which the accidental result is accomplished, and no knowledge of them, or of the method of its employment, is derived from it by anyone. (*Pittsburg Reduction Co. v. Cowles Electric Smelting & Aluminum Co.*, 55 Fed. Rep. 307). The chance operation of a principle, unrecognized by anyone at the time, and from which no information of its existence and no knowledge of a method of its employment, is derived by anyone, if proved to

have occurred, will not be sufficient to defeat the claim of one who first discovers the principle, and, by putting it to practical and intelligent use, first makes it available to man." *Andrews v. Carmen*, 13 Blach. 308. Fed. Case No. 371.

In *Naylor v. Alsop Process Co.*, 168 Fed. Rep. 911 (920), the court says:

"When it is sought to ascertain the state of the art by means of prior patents, nothing can be used except what is disclosed on the face of those patents. Such patents can not be reconstructed in the light of the invention in suit and then used as a part of the prior art." (See Dec. Dig. Paragraph 66).

In *Westmoreland Specialty Co. v. Hogan*, 167 Fed. Rep. 327:

"The after-discovery of unsuspected usefulness in a disclosed apparatus, far from detracting from its value, may serve to enhance it. It is the benefits which test, use, and time unfold that really determine merit. It is this after-test, the test of use, that proves the worthlessness of the great majority of patents and establishes the value of the few."

In *Goodwin Film & Camera Co. v. Eastman Kodak Co.*, 207 Fed. Rep. 351 (360):

"The Rule is that anticipating patents and publications must disclose the invention without

patentable change or alteration to make them anticipatory."

Waterbury Buckle Co. v. Aston, 183 Fed. Rep. 120; 105 C. C. A. 410.

From A. R. Mosler & Co. v. Lurie, 209 Fed. Rep. 364 (366-7), we quote:

"With a deliverance of the Circuit Court of Appeals for the Seventh Circuit (Gray Telephone P. S. Co. v. Baird Mfg. Co., 174 Fed. 417; 98 C. C. A. 353), we fully concur. It reads as follows:

'A patent for a mechanical combination is not anticipated by a drawing in a prior patent which incidentally shows a similar arrangement which is not essential to the first invention, and was not designed, adapted, or used to perform the function which it performs in the second invention, and where the first patent contains no suggestion of the way in which the result sought is accomplished by the second inventor.'"

"The first defense is based on the theory that the patents cannot be valid unless it is new in all its elements as well as in the combination. But this theory cannot be maintained. It if were sound no patent for an improvement on a known contrivance or process could be valid. And yet the great majority of patents are for improvements in old and well-known devices, or on patented inventions. *Changes in the construction*

of an old machine which increases its usefulness are patentable."

Cantrell v. Wallick, 117 U. S. 689. Citing—

Seymour v. Osborne, 11 Wall. 516;

Loom v. Higgins, 105 U. S. 580;

Hailes v. Van Wormer, 20 Wall. 353;

Star v. Crossman, 4 Cliff. 568.

"He has not made a great invention or a 'Pioneer invention,' if that much-abused expression be confined to its legitimate meaning, but he has produced a novel and useful device which is far removed from mechanical skill. His invention belongs to that vast field of minor achievements which has given this country its acknowledged pre-eminence and which it is the policy of the patent law to protect."

Eldred v. Kirkland, 130 Fed. 342; 64 C. C. A. 588.

In *Wagner Typewriter Co. v. Wyckoff, Seaman & Benedict*, 151 Fed. Rep. 585, the following is held:

"In construing improvement claims of a patent, consideration should be given to the character of the improvement introduced by the patentee, and the change in the art attributable to them. When that results in converting imperfection into completeness and in producing the first practical and commercial successful machine, however simple the change appears, the invention is entitled to liberal treatment by the court.

Courts look with favor upon patents for primary improvements which are novel and a manifest departure from the principle of prior structures, and which constitute the final step necessary to convert failure into success. A strict construction of the claims of a patent should not be resorted to, if the result would be a limitation on the actual invention, unless it is required by the language of the claim."

In the case of *Eck v. Kutz*, 132 Fed. Rep. 758 (779), the court says:

"Inventive discovery, as was admirably said at the argument, involves the intelligent apprehension of relations not before recognized by others, although actually existing, *followed by the conception of how that can be practically utilized.*"

In *Rose v. Hirsh et al*, 77 Fed. Rep. 469 (470), we have this language:

"We do not think the allegation that metal tubes with tapering ends, containing an equal quantity of metal throughout their length—thus having an increased thickness of walls in the tapering ends—were old is satisfactorily proved. That metal tubes with tapering ends were old, may be conceded; but that the walls of the ends were so thick is not clear. The usages for which these tubes were designed would not require such strengthening of the ends, and the surplus

metals used to produce the thickened walls would be simply wasted. If any such tubes were previously manufactured it must have resulted as an unintentional incident of the method employed in their manufacture, and not from design. Granting, however, that such tubes were recently made, the fact does not seem important. They did not constitute umbrella "sticks," nor such adaptability to its use. What Rose did was to invent and construct a metal umbrella "stick," having a new and useful feature—a tapering end so drawn down as to diminish the diameter of the tube, a part to which the "notch" is attached, without diminution of the metal, and materially increasing the strength of the "stick" where the strain upon it is greatest. We think it more deserving of a patent than much that has been adjudged patentable."

The claim in this case is as follows:

1. A tubular metal stick for umbrellas or parasols, said stick being drawn down at one end so that the tubular end portion of the stick is reduced in diameter and increased in thickness as compared with the body of the stick, substantially as described.

Defendants have cited a number of cases in which patents have been held invalid, but an analysis of these cases shows very clearly why the devices thereof were held not to involve invention, principally because of the mere duplication of something that was done before

without any new or different result, such as placing an additional pane of glass in a Buss fare-box so that the contents of the box could be seen from both sides, as in *Slawson v. Grand St. R. R. Co.*, 107 U. S. 649; or the application of an old process to a new subject, as in *Brown v. Piper*, 91 U. S. 44; or the use of a roller with designs on it, in a combination, where it was shown that a roller without a design had been used in the same way, and also that a roller with designs on it had been used in another combination, as in *Stimpson v. Woodman*, 10 Wallace 117.

Attention is here called to the case of *Watson v. Stevens*, 51 Fed. 757; 2 C. C. A. 500, in which the court holds:

“We conclude, therefore, that in applying to cases of doubt the primary rules touching what constitutes invention and the secondary rules touching what is a “new and useful result,” a “new function,” or a “new sphere of action,” we may be influenced by the facts that the improvement in question, *although desired for years, was not secured until brought out by the patentee; that the product of the improved machine or process went into general use, and displaced wholly or in a very large degree, by prior products.*”

Such are the facts in connection with the case before the court. Defendant Kerry, who has been in the logging business about thirty years, says (R. 101): “I

had never seen or heard of any logging trucks of that kind; I was in the logging business about thirty years; it was quite a radical departure from anything of the kind made before."

Mr. Chriswell, who has been engineer about nine and a half years for the Seattle Car and Foundry Company, says (R. 90): "*We have never built disconnected logging trucks with a high draw-bar at one end and the low draw-bar at the other until Mr. Kerry was in the market for them.*" On page 91 he also says: "*It was a departure * * * ; Mr. Kerry informed us that he could get these trucks from the Northwestern Equipment Company with high and low draw-bars * * * ; I had seen them and thought they were a practical truck well designed for taking care of long logs, and in order to get the order we told Mr. Kerry we could build him the same kind of truck.*"

"The facts that its usefulness is not denied, and that the appellant has seen fit to depart from the many devices open to his use, and to adopt that of the appellee, strongly indicate that it marks a distinct and useful advance in the progress of this art."

Brammer v. Schroeder, 106 Fed. 918; 46
C. C. A. 41.

"When the court is convinced that a meritorious invention has been made it should not permit infringers to evade the patent on narrow and

technical grounds." *Cimiotti v. American*, 115 Fed. 498, citing—

Machine Co. v. Murphy, 97 U. S. 120;

Cantrell v. Wallick, 117 U. S. 689;

Reece v. Globe, 61 Fed. 959.

The court, in considering this case, may very well say, as did the court in *Faries Mfg. Co. v. Geo. W. Brown & Co.*, 121 Fed. Rep. 547 (550):

"The eye that sees a thing already embodied in mechanical form gives little credit to the eye that first saw it in imagination. But the difference is just the difference between what is common observation and what constitutes an act of creation. The one is the eye of the inventive genius; the other of a looker-on after the fact."

The patent involved in this case covers an improved Knot in check-row wires, used in planting corn.

We must believe that the facts and the law and Defendant Kerry's own testimony on cross examination (R. 99-104) are abundantly sufficient to cause this Honorable Court, with satisfaction, to affirm the decision of the court below, and to further hold that the court below did err in awarding plaintiff damages in the amount of \$660.00, as stated in Paragraph 9 of the "Assignment of Errors," for the reason that Chandler's actual damages, as proved, on the one sale, was \$3,220, instead of \$220; for he had closed the deal for forty sets at \$700 per set, as proved by the testimony on both

sides. The testimony shows that it actually cost Chandler \$614.00 per set to build these trucks. The profit per set, therefore, was \$86, and on forty sets would have been \$3,440. Chandler, however, did build twenty sets at a profit of \$11 per set, or a profit of \$220, which deducted from the total loss would leave his total actual loss \$3,220. In addition to this actual loss, forced upon Mr. Chandler by an unfair competitor, he has had the long delay and expense connected with the disagreeable duty of enforcing his rights.

We respectfully submit, therefore, that the decision of the court below upholding the validity of Mr. Chandler's patent should not only be affirmed, but that the actual damages *should be assessed as proved*, to be \$3,220, and that, because of the deliberate unfair competition which deprived Chandler of this legitimate business, said actual damages should be doubled if not trebled.

Respectfully submitted,

WILLIAM R. LITZENBERG,

Attorney for Appellant.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,
Appellant,

vs.

BENJAMIN E. BOONE, INC., a corporation,
BENJAMIN E. BOONE AND BENJAMIN E. ,
BOONE, INC., a corporation,

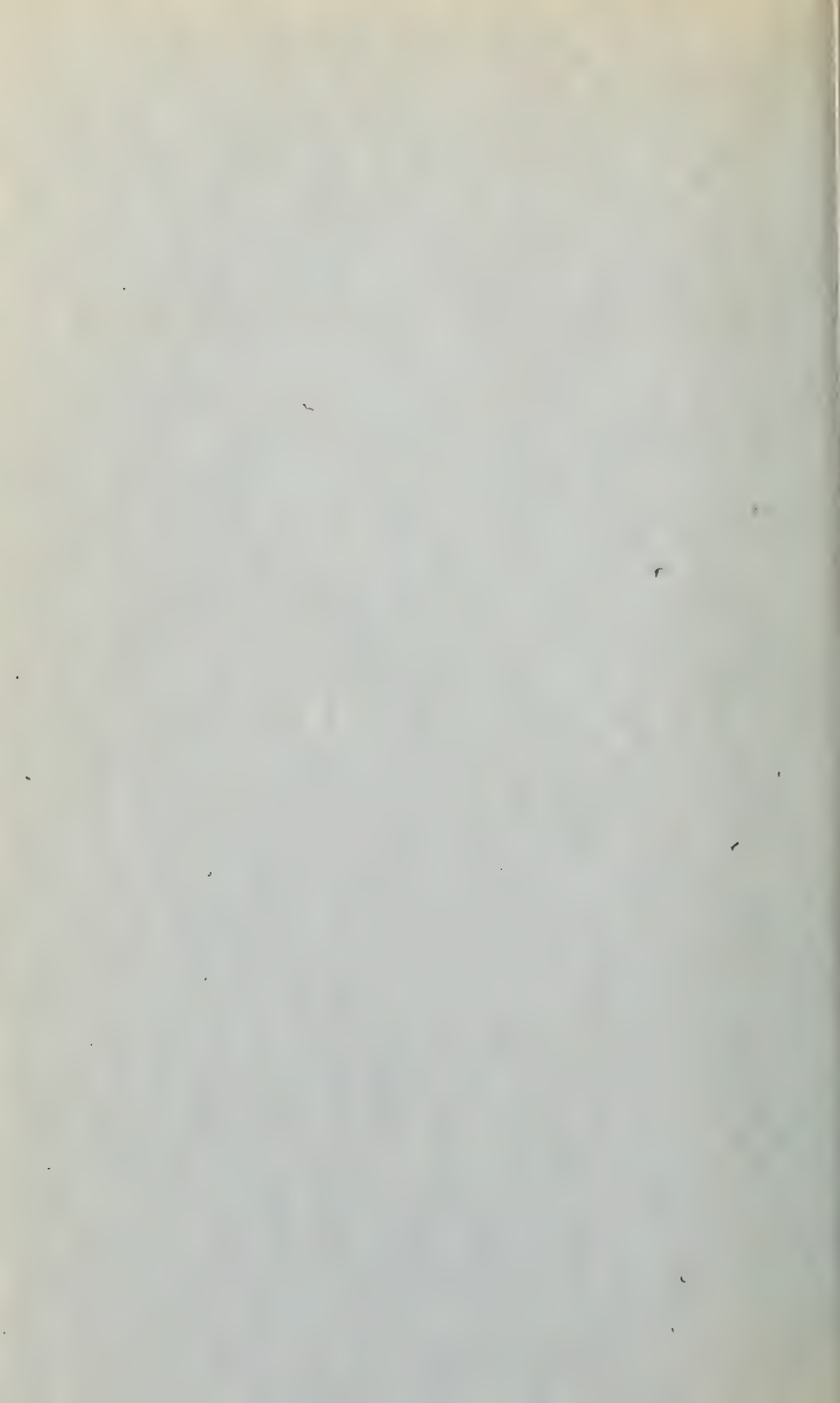
D. R. BOONE AND NORA CARLYLE,
a co-partnership, doing business as
Benjamin E. Boone & Co.,
Appellees,

Transcript of Record

On Appeal from the District Court of the United
States for the District of Oregon.

Filed

NOV 28 1916



No. _____

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,
Appellant,
vs.

BENJAMIN E. BOONE, INC., a corporation,
BENJAMIN E. BOONE AND BENJAMIN E.
BOONE, INC., a corporation,

D. R. BOONE AND NORA CARLYLE,
a co-partnership, doing business as
Benjamin E. Boone & Co.,
Appellees,

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On Appeal from the District Court of the United
States for the District of Oregon.

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*United States Circuit Court of Appeals for the Ninth
Circuit.*

FORD MOTOR COMPANY, a corporation,
Appellant,

vs.

BENJAMIN E. BOONE, Inc., a corporation,
BENJAMIN E. BOONE, and BENJAMIN E.
BOONE, Inc., a corporation, D. R. BOONE,
and NORA CARLYLE, a co-partnership, doing
business as BENJAMIN E. BOONE & Co.,
Appellees.

NAMES AND ADDRESSES OF THE ATTOR-
NEYS OF RECORD

E. L. McDOUGALL, Northwestern Bank Building,
Portland, Oregon, and ALFRED LUCKING and L. B.
ROBERTSON, Detroit, Michigan, for Appellant.

LITTLEFIELD and MAGUIRE, Corbett Building, Portland,
Oregon, for the Appellees.

CITATION ON APPEAL.

United States of America,
District of Oregon—ss.

To Benjamin E. Boone, Inc., a corporation, Benjamin E. Boone, and Benjamin E. Boone, Inc., a corporation, D. R. Boone and Nora Carlyle, a co-partnership, doing business as Benjamin E. Boone & Co.

Greeting:

WHEREAS, Ford Motor Company, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

You are, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, Oregon, in said District, this 18th day of September in the year of our Lord, one thousand, nine hundred and sixteen.

R. S. BEAN,
Judge.

Due service of the within citation on appeal is hereby accepted in Multnomah County, Oregon, this 18th day of September, 1916.

LITTLEFIELD & MAGUIRE,
Attorneys for Defendant.

Filed September 18, 1916.

G. H. MARSH, Clerk.

*In the District Court of the United States, for the
District of Oregon.*

March Term, 1916.

BE IT REMEMBERED, That on the 14th day of June, 1916, there was duly filed in the District Court of the United States for the District of Oregon, an Amended and Supplemental Bill of Complaint, in words and figures as follows, to-wit:

AMENDED AND SUPPLEMENTAL BILL OF
COMPLAINT.

*In the District Court of the United States in and for the
District of Oregon, in Equity.*

Ford Motor Company, a corporation,

Plaintiff,

vs.

Benjamin E. Boone, Inc., a corporation, Benjamin E. Boone and Benjamin E. Boone, Inc., a corporation, D. R. Boone and Nora Carlyle, a co-partnership, doing business as Benjamin E. Boone & Co.,
Defendants.

Plaintiff, having first duly obtained from the court the right to file this amended and supplemental bill,

complains and for cause of suit, alleges:

I.

That plaintiff is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the state of Michigan, with its factory and principal place of business in the United States in the Village of Highland Park, Michigan, and duly authorized to transact business as a foreign corporation, in the State of Oregon, with a factory branch in the City of Portland, Multnomah County, Oregon.

II.

That defendant Benjamin E. Boone, Inc., is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in Portland, Multnomah County, Oregon.

III.

That Benjamin E. Boone, Inc., an Oregon corporation, and D. R. Boone, and Nora Carlyle, of Arkansas, are a co-partnership, doing business under the firm name and style of Benjamin E. Boone & Co., with its principal place of business in the City of Portland, Multnomah County, Oregon, said defendants being engaged in the business of selling automobiles and accessories.

IV.

That plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of Michigan, and now transacting business in the said State of Michigan and divers other states and territories in the United States; that plaintiff has duly complied with all of the laws of the State of Oregon, pertaining to foreign corporations doing business in Oregon; that plaintiff and defendant respectively have permanent places of business and are transacting business in Portland, in the District of Oregon, and that the amount of the controversy between plaintiff and defendants greatly exceeds the sum of \$3,000, as hereinafter more particularly set forth.

V.

That the defendants are engaged in the general automobile business in the City of Portland, Multnomah County, Oregon.

VI.

That for a great many years, to-wit, twelve years last past, plaintiff has been engaged in the Village of Highland Park, Michigan, in the manufacture and selling of automobiles and automobile parts, said automobiles being commonly known as "Ford cars," "Ford automobiles" or "Fords," which automobiles and parts thereof, were invented, developed and fully perfected as the result of years of experience and manufacture and sales thereof by plaintiff, and fully protected by the patent laws.

VII.

That plaintiff has spent large sums of money in advertising in newspapers, magazines, etc., its products in the name of "Ford" and as a result of said advertising and of the merit of plaintiff's product, plaintiff's business grew and expanded and has constantly continued so to do, and that by reason of the advertising, publicity and public demand for the product of plaintiff, the words "Ford," "Fords," "Ford Motor Cars," "Ford Cars" and "Ford Automobiles," have come in the public mind to mean and to designate the automobiles, parts and accessories so manufactured and invented by this plaintiff.

VIII.

That in the conduct of this business plaintiff has made use of certain trademarks, among them a certain trademark known to the trade and public as the "Winged Pyramid" and carrying in script the word "Ford" and below the word Ford the words "The Universal Car," a copy of said trademark being attached to this complaint and made a part hereof and marked Exhibit "A"; and among them also the word "Ford" was written in script, a copy of said trademark being attached hereto and made a part hereof and marked Exhibit "B"; said trademarks and designs being duly registered as such by and through the United States copyright and trademark laws granting the exclusive right to use the same upon Ford automobiles, Ford parts and Ford accessories.

IX.

That in the conduct of its said business plaintiff appoints in divers states, counties, cities and towns, throughout the United States and elsewhere, certain corporations, firms and individuals to act as its agents in certain well defined territories in obtaining the sale of its said automobiles and pay to said corporations, firms and individuals so appointed by it certain discounts upon the parts sold by them; that in appointing such agents plaintiff enters into contracts and agreements with them, in writing, that they will not sell said automobiles in any territory not allotted to them in the respective contracts; that in the appointment and selection of said agents, plaintiff is careful to appoint only such persons who will carry out and observe the provisions of said contracts, and whom it may recommend to the public as reliable dealers, not only in the sale of said cars, parts and accessories, but in giving the proper service in the upkeep thereof thereafter.

X.

That plaintiff's agents are authorized and required to conspicuously display signs on and in their buildings and windows designating that they are agents for Ford cars, parts and accessories, and are required to give immediate and careful attention to all inquiries and to give good representations to all the interests of plaintiff in the territory respectively assigned to each of said authorized agents.

XI.

That under the agency contract of each of the authorized agents of plaintiff, sample copy of said contract being attached hereto and made a part hereof and marked Exhibit "C," the agent agrees that he will not make use of any advertising matter objectionable to plaintiff, and that as a result of the large amount of business transacted by plaintiff and the advertising done by it, and the great number of cars sold and distributed by plaintiff's authorized agents, certain words, phrases and expressions have come into general use as a part of the authorized advertising of such agents in connection with their signs on buildings and windows and in connection with their distribution of cards and letterheads, printed matter, newspapers and other advertising mediums, designed by such agents to promote their business in selling and distributing the product of plaintiff; that among such words, phrases and expressions which in the public mind, have come to mean that the person making use of such words, phrases and expressions is an authorized agent of plaintiff for the sale and distribution of its product, are the following:

The use on windows of the word "Ford," or "Fords."

The use on windows of the word "Ford" in dress and style imitating or resembling the trade-mark of plaintiff above referred to.

The use on business cards, letterheads, stickers, etc., of the word "Ford" in dress and style imitating or similar to plaintiff's trade-mark, as aforesaid.

The use on signs or banners of the word "Ford" or

the word "Fords" or the words "Ford Cars," "Ford Automobiles," or the words "Ford Distributors."

All of which by reason of the name and reputation of plaintiff and its method of vending its product have come to mean in the public mind that the persons so making use of such expressions, or any of them, are duly authorized and licensed by plaintiff to obtain sales of its said product in the territory wherein said advertising is used.

XII.

That the defendants are the owners and proprietors of a garage and sales rooms located on Alder Street in the City of Portland, Multnomah County, Oregon, and more commonly known as Benjamin E. Boone & Co.

XIII.

That none of the defendants herein are the authorized agents of plaintiff for the territory in which said place of business is located nor for any territory, and that none of the defendants are deemed by plaintiff suitable to receive an agency, or for arranging to sell plaintiff's automobiles, or the selling of plaintiff's accessories, and none of the defendants would be permitted by plaintiff any of the privileges accorded by plaintiff to its authorized agents; that defendants have respectively at all times herein mentioned, had full knowledge of the matters and things herein set forth and have been fully advised with reference thereto.

XIV.

That the defendants, for the purpose of misleading the public, and of fraudulently, unlawfully and unfairly diverting said plaintiff's trade, which lawfully and fairly belonged to the plaintiff and its authorized agents, and for the purpose of affording to plaintiff and its authorized agents an unfair competition and with the fraudulent intent and purpose of defrauding plaintiff and the public and of causing the public to believe that the said defendants are authorized agents of the plaintiff in obtaining the sale of its product, has been guilty, and continues to be guilty, of various fraudulent, unfair and misleading actions and representations; and that by said false, fraudulent and unfair methods the defendants have done and are doing, and unless restrained by this court will continue to do, to the plaintiff and its said authorized agents great and irreparable injury and plaintiff's business will be destroyed or placed in great jeopardy.

XV.

That among the false, fraudulent, unfair and misleading representations and actions of said defendants are the following:

(a) That defendants maintain on the front of their place of business the words "Benjamin E. Boone & Co., automobiles," and on the west side of their building a large sign with the word "Fords," said word being understood by the public to be employed only by the plaintiff and its authorized agents.

(b) That the defendants have caused to be printed certain posters which have been placed upon oil cans containing an automobile oil, carrying at the top of said posters the "winged pyramid" with the script word "Ford" thereon, imitative of plaintiff's trademark and at the bottom of said poster, after a description of the contents of said can, the words "Benjamin E. Boone & Co., Ford Agents, Portland, Oregon."

(c) That defendants have continually falsely, fraudulently, and unfairly represented to prospective purchasers of Ford cars that they were Ford agents, that they obtained Ford cars in quantity either from plaintiff's main factory at Highland Park, Michigan, or from the duly authorized factory branch at Portland, Oregon, or other factory branches elsewhere.

(d) That the defendants importuned agents of plaintiff at Woodburn, Marion County, Oregon, and at Kelso, Cowlitz County, Washington, and other agents of plaintiff at present unknown to plaintiff, in territories remote, from the defendant's place of business, to breach their said contract with plaintiff herein and did in collusion with said agents, fraudulently cause to be made and sent in to plaintiff's factory branch, fictitious orders for Ford cars and forthwith caused the Ford cars ostensibly ordered by said persons for disposition in vicinities of Woodburn, Marion County, Oregon, and Kelso, Cowlitz County, Washington, and elsewhere, to be driven or shipped by a roundabout course, without plaintiff's knowledge, to the defendant's place of business said automobiles, all for the purpose of obtaining

fraudulently, unfairly and in violation of the rights and contracts of plaintiff, and its authorized agents, certain Ford cars for the purpose of lending color to the false and fraudulent representations of defendants that it is plaintiff's authorized agent in the territory wherein defendants' place of business is located.

(e) That the defendants have caused to be printed in the Portland classified index of the Pacific Telephone & Telegraph Company's telephone directory the following: "Boone, Benj. E. & Co., Ford Auto Agency, 514 Alder St., Main 3966."

(f) That since the institution of this suit plaintiff has caused to be run in the Portland Oregonian and the Oregon Journal, on June 8, 1916, an advertisement, copy of which is attached to this complaint and made a part hereof and marked Exhibit "D," wherein it has advertised for sale new Ford automobiles fraudulently obtained from this plaintiff's agents; said advertisement setting forth that the price of said new automobiles in any territory is \$467.50, said price being greatly below the regular advertised retail selling price at which this plaintiff and this plaintiff's agents are permitted to sell said automobiles. As a result of said advertisement the defendants herein have fraudulently and unfairly, and in violation of the rights and contracts of plaintiff and its authorized agents, obtained customers of the plaintiff herein and its authorized agents, and made it impossible for plaintiff's authorized agents in the vicinity of Portland to sell Ford automobiles in accordance with their contracts with this plaintiff, and the plaintiff in

the city of Portland to sell automobiles in accordance with the contracts of its authorized agents, resulting in the jeopardizing of plaintiff's business.

Plaintiff alleges that said false, fraudulent and misleading representations and unfair competition and conduct has continued with respect to the allegations contained in sub-paragraphs A, B, C, D and E for a long period of time, to-wit: since February 1, 1916, and that the specific offenses charged in said sub-paragraphs have occurred frequently and continually prior to and during the period intervening between February 1, 1916, and the date of the filing of this suit; that said sign upon the defendants' place of business and said statement upon the cans of oil offered for sale by the defendant and the defendants in exhibiting the same have done so with the deliberately fraudulent intent and purpose of defrauding the plaintiff and its duly authorized agents and of misleading the public and prospective purchasers of Ford automobiles to believe that said defendants are authorized to arrange for the sale of Ford automobiles in Portland, Multnomah County, Oregon, and elsewhere, and to mislead and deceive said prospective buyers into the false supposition that they are entitled to received from defendants all the benefits which they might lawfully receive from a bona fide agent of this plaintiff; and that said sign displayed as above mentioned bearing the name "Fords" and the said statement upon the oil cans bearing the trademark and trade name of this plaintiff and the statement that the defendants are Ford agents and the statement in the Pacific Telephone & Telegraph Company's directory

that the defendants are a Ford Agency and the conduct of the defendants with respect to the plaintiff's agency at Woodburn, Marion County, Oregon, and at Kelso, Cowlitz County, Washington, and elsewhere, have been done, made and performed with the fraudulent intent and purpose on the part of said defendants of defrauding the plaintiff and its authorized agents and the public and of causing the public, and particularly prospective purchasers of Ford cars, to believe that said defendants were authorized agents of the plaintiff or in somewise lawfully connected with the plaintiff for the sale of its products, and for the purpose of misleading said prospective purchasers in the assumption that they are entitled to receive from defendants all benefits which they might lawfully receive from bona fide agents of the plaintiff.

XVI.

That by said false, fraudulent and unfair method of conducting defendants' business and by said false, and fraudulent signs, banners, inscriptions, labels, conduct, representations and statements, defendants continuously have done, are doing, and threaten to continue to do to plaintiff and its authorized agents, great and irreparable injury and damage and will destroy or place in great jeopardy plaintiff's business.

XVII.

That plaintiff has not means of ascertaining or determining just how many persons have been deceived by the signs, advertisements and representations above re-

ferred to, nor how many have purchased automobiles from defendants believing them to be the authorized agents of plaintiff, nor has plaintiff any means of estimating in money, the damage so done to plaintiff, its agents, or the public, nor has plaintiff any means of ascertaining or determining as to how many persons will be deceived in the future by the continuance and threatened continuance of said false and fraudulent advertisements and representations nor how many will be induced to purchase cars from said defendants by reason thereof, nor will plaintiff be able to determine in an action at law by any known measure of damages the sum of money which it will lose by reason of such fraudulent and unfair method of doing business, and plaintiff therefore alleges that it has no adequate and complete remedy at law and can only obtain relief by the equitable remedy of an injunction and accounting.

WHEREFORE, plaintiff prays for a decree of this court, that defendants and their employees and attorneys, be at first temporarily and afterwards permanently restrained and enjoined from

First: Making, advertising, or circulating any statements, or representations to the effect that the defendants are agents for the selling of Ford automobiles and the sale of Ford parts and accessories in the United States, or elsewhere.

Second: Using any sign, label, or using in any other manner whatsoever, the word "Ford" or "Fords" in dress and style imitative of plaintiff's trademark,

or using in any manner whatsoever any other trademark of plaintiff.

Third: Employing any sign, banner or other device containing the word "Ford," "Fords," or other combinations of the word "Ford" alone or with other words, or expressions implying that defendants are authorized agents of the plaintiff.

Fourth: Representing that defendants have any relations or dealings with plaintiff's factory at Detroit, Michigan, or with plaintiff's factory branch at Portland, Oregon, or any of plaintiff's other factory branches elsewhere.

Fifth: Acquiring a secret and undisclosed interest in any agency for the sale of Ford cars, and from inducing or attempting to induce any authorized agent of the plaintiff to make sales of Ford cars in violation of any of the terms of the contract of such agent with plaintiff.

Sixth: From advertising to the public or offering for sale to the public any new and unused Ford automobiles obtained from the duly authorized agents of the plaintiff herein in violation of said agents' contracts.

Seventh: For such other and further relief as to the Court may seem proper.

And for the costs and disbursements incurred in this suit.

E. L. McDOUGAL,
Attorney for Plaintiff.

EXHIBIT "A."



EXHIBIT "B."

Ford

EXHIBIT "C."

1915-SUB-LIMITED AGENCY CONTRACT-
1916.

THIS AGREEMENT, made at Highland Park, Michigan, this 2d day of August, 1915, by and between the Ford Motor Company, a Michigan corporation of Highland Park, Michigan, hereinafter known as the first party and Vick Bros. of Salem in the State of Oregon, hereinafter known as the second party, and S. E. Brune & Son of Woodburn, in the State of Oregon, hereinafter known as third party, **WITNESSETH:**

WHEREAS the first party is the manufacturer of a line of automobiles known as Ford automobiles and also of automobile parts and accessories, and

WHEREAS the second party is the Limited Agent of first party within certain territory including that hereinafter described for the sale of Ford automobiles and parts under certain defined and limited restrictions, and

WHEREAS the third party has applied to the first party to be the agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and first and second parties are willing to appoint third party, with certain limited authority and upon the following terms and conditions only:

APPOINTMENT AS SUB-LIMITED AGENT.

NOW, THEREFORE, this witnesseth:

(1) That second party hereby designates and the first party hereby confirms the third party as Sub-Limited Agent with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

POWERS.

(2) That third party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

AUTOS ON CONSIGNMENT.

(3) That first party will consign its Ford automobiles to the third party through the second party to be sold to users only, and not for re-sale, upon bills of sale to be executed by the first party only, as hereinafter provided.

TERRITORY.

(4) That third party shall arrange for sales of Ford automobiles only to residents of the following specified territory shown on the attached map, and to no other, namely:

North line running directly east and west through south portion of Hubbard, South line between Township line five and six, east line County line, West line County line (map).

RESIDENCE DEFINED.

In this connection, it shall be construed that a purchaser resides at either (a) his legal domicile; (b) the place where he sojourns for not less than three consecutive months; (c) his permanent place of business or occupation; or (d) either home where more than one is maintained. The decision of the first party in all violations of this sub-division shall be final and conclusive with no recourse or appeal on the part of the other parties.

DAMAGES FOR BREACH TERRITORIAL RESTRICTIONS.

(5) The sales of Ford automobiles to residents outside of third party's own territory is a serious trespass

upon the rights and earnings of other Limited Agents and Sub-Limited Agents, and tends to destroy the organization and business of the first party, and therefore, it is agreed that the territorial restrictions and limits set forth herein are of vital consequence to the first party and its business, as well as to the business of all other Limited Agents and Sub-Limited Agents, and therefore, for any and each violation of the same by the third party, third party hereby agrees to pay to the first party the sum of Two hundred fifty dollars (\$250.00) as and for liquidated damages. Said sum or sums may be deducted from any deposit he may have with the first party, or from any sums which first party may owe, for business done, to third party. First party may also cancel this contract for any such violation.

PRICES.

(6) Third party shall arrange for sales of Ford automobiles to users at the first party's full advertised list prices only, current at date of sale, plus Fifty-three and 25/100 Dollars (\$53.25) for each automobile for freight charges and delivery expenses, plus the amount, if any, of any present or future United States tax or excise upon or in respect of each automobile or sale thereof. Wherever the words "List price" are used herein they mean the latest retail selling price established or fixed by the first party.

SALES OF AUTOS FOR CASH ONLY.

(7) Third party shall arrange all sales of Ford automobiles for cash only; but if third party should accept anything but cash payment on Ford automobiles, it must be upon his own responsibility and for his own account solely, and he must remit cash only to second party or first party.

REBATES FORBIDDEN.

(8) Third party will not render any services or supply any goods either gratis or at reduced prices, nor

do or permit any act whatsoever either directly or indirectly, or through other parties, that would directly or indirectly have the effect of reducing the said current advertised list prices of Ford automobiles, plus freight and delivery charges, and said United States tax or excise, if any, and in the event of a breach or violation hereof, third party shall pay to the first party the sum of Two hundred fifty dollars (\$250.00) for every such breach or violation as and for liquidated damages arising to the first party and its business by reason of such breach or violation, or the same sum may be deducted from any moneys in first party's hands belonging to third party or which first party may owe, for business done, to third party. First party may also cancel this contract for any such violation.

CHANGES IN PRICE.

(9) The first party may change the list prices of any of its products at any time it may choose, and third party shall conform to such changes immediately upon receiving notice thereof, and in case of increase or reduction in such list prices, first party shall not be bound to make any allowance to third party in cases of automobiles shipped before such changes take effect, and the third party's commission on automobiles as yet unsold by him shall be the difference between the eighty-five per cent (85%) advanced by him on such automobiles and the new selling price, provided; that in case of a reduction in price there will be allowed to third party a proportionate rebate on his advances made on such automobiles as still remain unsold in his possession at the date of such reduction as to automobiles shipped to the third party within thirty days immediately before such date, but none as to those shipped prior to such thirty day period.

ADVANCES.

(10) Third party shall advance in cash to second party or first party as the case may be, eighty-five per cent (85%) of the full advertised list price at the time of the consignment of its automobiles to third party.

FREIGHT.

(11) Third party shall pay all freight paid out and to be paid out on the particular automobiles from Detroit or branch factory and advance freight if any, as the case may be, to third party's place of business.

TITLE OF AUTOS.

(12) First party shall retain all and complete title to each automobile until actual bill of sale, signed and executed by first party, has been delivered to the vendee, who shall be only a user; that is, one who has purchased for immediate use and not for re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever.

LIEN FOR ADVANCES. INSURANCE.

(13) Third party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same and for freight paid by him on the same, and he shall keep and maintain insurance so as to protect himself against loss.

RETAIL BUYERS' ORDERS.

(14) Third party shall take from each proposed purchaser of a Ford automobile and immediately forward to second party for the first party, a written order duly signed by him, upon the regular blank "Retail Buyer's Order," furnished by first party, without alterations or changes except the filling in of blanks, and third party will make no arrangement for the sale of a Ford automobile without taking such written signed order.

DEPOSITS ON AUTOS.

(15) All deposits of money, checks, etc., on Ford automobiles made by proposed buyers shall be remitted immediately when received with the Retail Buyer's Order to the second party for the account of the first party, who shall be the custodian thereof, and first party will make proper disposition thereof when the transaction is closed according to the rights of all parties.

COMPANY MAY REJECT ORDERS.

(16) The dealings of the third party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, but first party may wholly reject the same for any reason satisfactory to first party, and the proposed purchaser shall acquire no rights whatever in the automobile until delivery of the duly executed bill of sale as herein provided.

WEEKLY REPORTS OF BUSINESS.

(17) The third party shall report each week to second party for transmission to first party all Ford automobiles contracted for by him with purchasers under this agreement, giving motor number and description of each automobile sold or contracted for, the date of sale and full name and address of each purchaser.

WARRANTY.

(18) Third party shall have no authority to make any warranty whatsoever of Ford automobiles, but the purchaser shall be referred to the provisions of the Retail Buyer's Order and Bill of Sale in that behalf. Third party shall have no authority to make any warranty representing first party, of any parts or accessories. The current printed literature issued by the first party, will contain the only warranties of parts or accessories made by first party.

REPRESENTATIONS.

(19) The third party shall make no representations as to Ford automobiles or parts or accessories, except the same as are set forth in the printed literature issued by the first party. If third party violates these provisions he may be personally liable, but shall not in any wise bind the first party.

CLAIMS AGAINST CARRIERS.

(20) In case of damage to automobiles by carriers in transit to third party, collection from the carrier shall be made in the name of the first party as the owner of such automobiles—but as between the parties hereto, the third party shall be entitled to eighty-five per cent (85%) of the amounts realized, less the like proportion of expenses of collection, or the first party may, at its option, assign to third party all its claims in such matter, whereupon third party shall present and prosecute his own claim without any liability of the first party, and it is stipulated that first party shall not be liable to the third party for any injury or damage to the automobile after it is once delivered to the carrier or for any return of the advances thereon.

KEEP PLACE OF BUSINESS.

(21) That third party will maintain on his own account and at his own expense, a place of business and properly equipped repair shop prominently located in Woodburn for the purpose of conducting such Sub-Limited Agency business, and shall employ competent and efficient salesmen, and first party shall not in any wise be responsible for the charges connected with such place of business, nor shall third party have any authority to render first party responsible for the rent, taxes, wages, or other charges or liabilities of any nature whatsoever arising out of such business or in connection with such place of business.

THEFT OF DAMAGE TO AUTOS. FIRST PARTY NOT LIABLE FOR DAMAGES.

(22) Third party shall safely keep and he hereby agrees to save first party harmless against theft or damage of any kind to said Ford automobiles while in his possession under consignment, and in consideration of his being granted this agency, he expressly agrees that he will bear all damage or injury arising from theft, accident, injury or other cause to said automobiles so consigned to him while in his possession, or while in transit from first party or second party to third party. Inasmuch as first party bases its output and expenditures upon the orders given by its Limited and Sub-Limited Agents, therefore, and in consideration of this contract the third party hereby agrees to arrange sales under the terms of this contract and by and in accordance with the methods herein provided, of all the automobiles consigned and delivered to him pursuant to his orders for the same, and first party shall not be liable to return to third party his advances on same. The third party also agrees to save first party harmless against any and all claims made against first party by any person or persons not parties hereto for damages arising out of the conduct of third party's said business or Sub-Limited Agency whether from accident or injury or collision or loading or unloading or driving or theft or fire or from any cause of any and every nature whatsoever.

TAXES.

(23) The third party shall, as a part of the expenses of his business, pay any taxes that may be levied upon or against or on account of such business or his stock, or of any of such automobiles as may be in his possession, or in transit on bill of lading, or otherwise, for delivery to him.

SIGNS. ADVERTISEMENTS.

(24) The third party agrees to conspicuously display signs on and in his building and windows, design-

nating that he is the "Sub-Limited Agent for Ford cars" for the territory specified herein and he shall advertise the first party's product effectively in the local papers and give his immediate and careful attention to all inquiries, and give good representation to all interests of first party in the territory aforesaid. Third party agrees not to advertise or trade in the first party's product in such a way as to be an annoyance or injurious to first party or any of its duly appointed Limited Agents or Sub-Limited Agents, and that he will not repeat any such advertisements or publish any form of advertising containing matter to which the first party has objected, and that he will follow as closely as possible the advertising copy provided from time to time by the first party. When agency of third party is cancelled or terminated he agrees to remove all such signs and cease such advertising.

REPAIRS, NUMBER PLATES, ETC.

(25) Third party agrees that he will make repairs on all Ford automobiles in his territory, or coming into his territory, whether sold through him or not, and to perform this work promptly and in workmanlike manner, and that he will not remove or alter the first party's patent plate, motor number, or other numbers or marks affixed to any Ford automobile, or suffer the same to be done, and that he will not materially change any automobile consigned to him by the first party.

DEMONSTRATOR.

(26) Third party agrees to purchase from first party or through second party for himself and keep in use at all times at least one Ford automobile of the current year's model, for the sole purpose of demonstration and exhibition to intending purchasers and to maintain same in proper running condition and good, clean order and repair at all times. If he sells said automobile before the same has been in actual use three months, third party agrees that he will sell same at the full advertised list price only, and within his own ter-

ritory only, as provided in sub-divisions four, six and eight hereof. For any breach of this provision the third party shall pay to first party Two hundred fifty dollars (\$250.00) as reasonable liquidated damages. The only warranty of such demonstrating or service cars by the first party is agreed to be the same as that given by first party on automobiles sold to the general public and which is printed in the Retail Buyer's Order.

PATENTS.

(27) First party owns, and the Ford automobiles are manufactured under, and embody the following letters patent of the United States, or some of them, namely:

United States letters patent No. 747,909 issued December 22, 1903.

United States letters patent No. 773,934 issued November 1, 1904.

United States letters patent No. 787,908 issued April 25, 1905.

United States letters patent No. 847,405 issued March 19, 1907.

United States letters patent No. 879,757 issued February 18, 1908.

United States letters patent No. 1,005,186 issued October 10, 1911.

United States letters patent No. 1,012,620 issued December 26, 1911.

United States letters patent No. 1,044,038 issued November 12, 1912.

United States letters patent No. 1,066,729 issued July 8, 1913.

United States letters patent No. 1,073,569 issued September 16, 1913.

United States letters patent No. 1,075,557 issued October 14, 1913.

United States letters patent No. 1,078,042 issued November 11, 1913.

United States letters patent No. 1,098,361 issued May 26, 1914.

and of applications for letters patent now pending and undetermined. First party further owns, and Ford automobiles, parts and accessories are manufactured and sold under and embody the exclusive right to the use of the name "FORD" acquired by and through United States copyright and trademark registration numbers 74,530, issued July 20th, 1909 (script word "FORD"), and 98,655, issued July 28th, 1914 (winged pyramid design), together with the rights acquired and established thereto by and through fair trade and trade user. The validity of each of said patents and of the said copyright, registration and trade user rights, and of the claims of the first party under said applications is hereby expressly admitted; and it is agreed that the sale and use of said automobiles as delivered to the third party are restricted according to the terms of this agreement of agency, and that no license to handle or use said automobiles under such patents and applications, except strictly in accordance with the terms and conditions of this contract, is given; that third party's right to handle and deliver said automobiles embodying said patents and inventions, is restricted and limited by this contract in its terms, and that no person shall acquire the right to use said automobiles or to own the same if there be any violation of the territorial or price restrictions set forth herein; and any such violation shall constitute an infringement of each and every of said patents, applications and inventions.

COMMISSIONS.

(28) As third party's commission for making such sales of Ford Automobiles, first party will, after payment by the purchaser, allow to third party (except in the cases specified in sub-division nine hereof) fifteen per cent (15%) of such full advertised list price, and will

allow to third party such freight and delivery charges, and United States tax or excise, if any, as aforesaid.

ADDED COMMISSIONS.

(29) First party agrees to allow and pay to third party the following additional commissions on the net amount of business he shall do hereunder during the term of this agreement upon Ford automobiles, but not on Ford parts, repairs or accessories, namely: No added commissions whatever when his said business shall total less than \$5,000.00, but when the third party shall have done such business (not including freight charges and not including his fifteen per cent (15%) commission) to the amount of \$5,000.00, his right to additional commissions shall begin, and he shall be entitled to such added commissions as follows: On all such business totaling less than \$10,000.00, one per cent (1%); if \$10,000.00 and less than \$20,000.00, two per cent (2%) on all such business; if \$20,000.00 and less than \$35,000.00, three per cent (3%) on all such business; if \$35,000.00 and less than \$50,000.00, four per cent (4%) on all such business; if \$50,000.00 or more, five per cent (5%) on all such business. That is, for illustration, if he shall have done \$7,000.00 total business as above described, his commission shall be one per cent (1%) on all of such \$7,000.00. If, for illustration, his total business as above described shall be \$34,900.00, his commission shall be three per cent (3%) on all of such \$34,900.00. If \$49,900.00, then four per cent (4%) upon all of such \$49,900.00; if it shall total \$50,000.00, then five per cent (5%) on all of such \$50,000.00, and likewise five per cent (5%) upon all such business over \$50,000.00.

If any payments shall have been made to third party during the year on the one per cent (1%) basis or any lower basis than he shall finally be entitled to such payments shall be credited on the final amount owing him and shall be deducted when he becomes entitled to and shall receive the higher percentages.

COMPANY MAY SELL DIRECT.

(30) First party and second party hereby expressly reserve to each the right to make direct sales to customers in the territory above described, and in such case will pay one (and only one) commission of five per cent (5%) of the list price of the automobile or automobiles so sold, after first or second party shall have received the full purchase price in cash, to the third party. This provision shall not apply to sales of parts or accessories, which are otherwise provided for herein, nor to sales made to purchasers domiciled or residing outside said territory within the meaning of Sec. four of this agreement, even though delivery should be made within said territory to residents of such other territory.

STOCK OF FORD PARTS.

(31) Third party agrees that he will purchase from the first party on his own account and carry on hand at third party's place of business aforesaid, a stock of Ford parts that will inventory at all times during the term of this agency contract, not less than Two Hundred Dollars (\$200.00) at the list price, and first party shall have the right to send its representative to inventory such stock of Ford parts as third party may have on hand, at any time during the term of this contract. First party may cancel this contract for any breach of this provision. Inasmuch as the reputation of Ford automobiles is often injured by the use therein of inferior parts not made or furnished by the Ford Motor Company, therefore, the third party also hereby agrees that all his purchases of parts of Ford automobiles shall be made, as to all parts listed in its parts catalogue, exclusively from the first party, and that he will not use, sell or recommend to Ford owners similar parts manufactured by others.

DISCOUNT ON PARTS.

(32) First party agrees to allow the third party a discount of Twenty-five per cent (25%) on all parts of

Ford automobiles listed in the Ford parts price lists, excepting on bodies, on which the discount shall be fifteen per cent (15%) only. These discounts are allowed in consideration of third party's agreement to carry stock as provided in sub-division thirty-one above, and in consideration of the other provisions of this contract.

RETURN OF PARTS.

(33) The third party shall have the right and privilege of returning to first party at the place of purchase at any time during the term of this contract, or within thirty days after its cancellation or expiration, but at his own expense, for credit at the purchase price, all such new parts of first party's automobiles as he may desire, except bodies, tops, tires, lamps, generators, speedometers, windshields, and other equipment known in the trade as "accessories" provided same are in as good condition as when sold by the first party or second party to the third party.

COMPANY MAY SELL PARTS.

(34) First party and second party reserve the right and privilege to sell and deliver or cause to be sold and delivered any parts of Ford automobiles, repairs, accessories or other goods that may be ordered from them by any person or persons within the territory covered by this agreement, without the payment of any profit or allowance or any discount or credit whatever to the third party upon such sales. It is expected and intended that third party will carry the stock of Ford parts, repairs and accessories as herein provided, and that nearly all orders for such parts, repairs and accessories will be placed with him by all persons in the above described territory.

CLAIMS.

(35) It is further agreed that no claims regarding errors in shipments or billings are to be recognized by first party, unless received in writing either by the

first party or the second party from the third party within ten days after receipt of the goods by the third party.

CRATING, ETC., EXTRA.

(36) The first party will be entitled to receive an extra charge for crating, packing, double decking and loading, which the third party shall stand and pay as a part of the expenses of conducting his business.

DELAYS IN SHIPMENTS.

(37) The first party shall not be liable in any way for delayed shipments of any goods ordered, or on account of shipments by any other than a specified route.

PAYMENTS AT HOME OR BRANCH OFFICE

(38) The third party agrees to take up all sight drafts with exchange drawn on him by the first party for automobile consignments or for shipments of parts, when shipments arrive or when sight drafts are presented, the intent hereof being that payments are to be made to the first party at its home or branch office, but if it elects to draw drafts, the same will be honored with exchange by third party.

DEPOSITS.

(39) As a guarantee of the full and faithful performance by the third party of all the terms and conditions of this agreement, the third party has deposited with the first party the sum of Two Hundred Dollars (\$200.00) in cash, and it is agreed that the first party may, at its option, apply any part or all of said amount towards the liquidation of any past due accounts owing by third party to first party, or any other legitimate claims arising from the third party's failing to perform the obligations of this agreement, and the balance of said contract deposit, if any, shall be returned to the third party at the termination of this agreement and the fulfillment of all its requirements. In case of cancellation or termination of this contract as herein provided,

such deposit balance on hand may be retained by first party as security for and until the fulfillment of all provisions hereof as to the winding up of the business of the agency and final disposition of all unsold cars as stipulated herein. Third party shall not be at liberty to treat said deposit as an offset against any accounts owing by him to first party.

ESTIMATE OF AUTOS REQUIRED.

(40) In order that first party may determine the prospective requirements of its business for the business year ending July 31, 1916, and may base its contracts for materials, etc., thereon, the third party agrees that he will require consignments of not less than 22 Ford automobiles for his said territory between the date hereof and July 31, 1916, to be shipped in the various months as per the following schedule, and he hereby makes requisition for such automobiles to be shipped as stated, namely:

In August, 1915, 8 autos	In February, 1916, 0 autos
In September, 1915, 0 autos	In March, 1916, 0 autos
In October, 1915, 0 autos	In April, 1916, 8 autos
In November, 1915, 0 autos	In May, 1916, 3 autos
In December, 1915, 0 autos	In June, 1916, 0 autos
In January, 1916, 3 autos	In July, 1916, 0 autos

REQUISITIONS MAY BE DECLINED.

(41) First party agrees that the foregoing requisitions of the third party will receive first party's careful and good faith attention, but first party does not agree absolutely to fill them, but expressly reserves the right to refuse them from time to time, or such parts of them as the first party deems necessary or proper, and all such requisitions are subject to delays occurring from any cause whatsoever in the manufacture and delivery of its product—no legal liability to fill such requisitions being incurred under any circumstances. And the third party may cancel, upon one month's full written notice to first party, the said requisitions, or what remains unfilled thereof.

PRICE MAY BE CHANGED.

(42) It is further agreed that the foregoing requisitions for consignments of Ford automobiles are given by third party and received by first party subject to the express condition that prices are subject to be changed by the first party at any time during the year and deposits are so accepted; in the event of changes, however, the third party may cancel such remaining requisitions, and may demand and receive back from the first party such deposits as may have previously been made, less any amounts for which third party may be obligated or owing either directly or indirectly to the first party.

NO ASSIGNMENT.

(43) The third party shall have no right to assign this contract, or any interest in the same, without the written consent of the first party.

METHODS OF TRANSACTING BUSINESS.**SAME MAY BE CHANGED.**

(44) The intention of the parties is that third party shall transact his business with first party through the second party—receive the consignments of automobiles through second party, make advances to second party, make remittances and deposits through second party, make his reports and send his Retail Buyers' Orders, receive his payments or commissions and the like through the second party, and generally transact his business under this contract through the second party; but all final authority and direction shall rest with the first party, who may order or direct any change in methods of business either in particular instances or in general, as it may deem best, and the second and third parties shall conform thereto.

DITTO.

(45) If the contract of the Limited Agency which exists between first party and second party, and which covers the territory of third party herein described, together with other territory, shall be terminated for any reason or by either party, then the first party shall take over this contract with third party and transact the business directly, or substitute another Limited Agent as the second party hereto at first party's option.

CANCELLATION.

(46) This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either the first or third party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from the third party prior to the date when such cancellation takes effect.

SALE OF AUTOS ON HAND AT TIME OF
TERMINATION.

(47) In case of the cancellation or expiration of this contract the first party may at its option retake possession of all such of the aforesaid automobiles as third party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements on the said automobiles; or at the option of the first party it shall be the duty of the third party and he undertakes (for the purpose of winding up the affairs of his said Sub-Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided, however, if, after reasonable effort

on the part of third party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request by third party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said third party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.

TERMINATION.

(48) Upon termination of this contract, whether by expiration or cancellation, all liability on the part of the first party or second party shall, except as to matters pending at the date of such termination, cease and determine, and the third party shall have no claim to commission, rebate or damage, notwithstanding transactions may thereafter take place with or sales be made to parties with whom the third party shall have dealt during the currency of this contract.

NO WAIVER OF THESE PROVISIONS.

(49) The failure of the first party to enforce at any time any of the provisions of this contract, or to exercise any option which is herein provided, or to require at any time performance by the third party of any of the provisions hereof, shall in no way be construed to be a waiver of such provisions, nor in any way to affect the validity of this contract or any part thereof, or the right of the first party to thereafter enforce each and every such provision.

MICHIGAN CONTRACT.

(50) This contract, it is agreed, is a Michigan contract and shall be construed as such.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

Signature of the First Party

FORD MOTOR COMPANY.

By W. A. RYAN (L. S.)
Manager of Sales.

Approved, F. B. NORMAN,
Branch Manager.

O. K'd, W. S. McNAMARA,
Accounting.

Ckd. and App., E. W., Sales.

Signature of the Second Party,

VICK BROS. (L. S.)

By GEO. F. VICK (L. S.).

Witness: CHAS. E. GODON.
Signature of the Third Party,

S. E. BRUNE & SON (L. S.).

By S. E. BRUNE (L. S.).

Witness: CHAS. E. GODON.

BANK OF WOODBURN.
(Name of Sub-Limited Agent's Bank.)

Form 926.

C. R. Oct. 22, 1913, page 22, \$200.00 (Received
Portland Branch Dec. 17, 1915).

Ford Motor Co.

(Indorsed)

Portland, Ore., Branch

1915-1916

SUB-LIMITED AGENCY CONTRACT.

File No. 5172.

FORD MOTOR COMPANY

Highland Park, Michigan,

WITH

S. E. Brune & Son

Street

City, Woodburn.

State, Oregon.

Territory, Woodburn, Ore., and vicinity.

Dated August 2, 1915.

Expires July 31st, 1916

Under Limited Agent:

Vick Bros., Salem, Ore.

EXHIBIT "D."

Our Festival Week Special

New Ford Touring Cars

\$467.50 CASH

We Are NOT Agents of the Ford Motor

Co. Our Territory Is Unlimited.

Buy That New Ford Car Now and Drive It Home

BENJ. E. BOONE & CO.

514 Alder Street

Main 3966

State of Oregon,
County of Multnomah,—ss.

I, F. B. Norman, being first duly sworn, depose and say that I am the manager of plaintiff corporation, in the above entitled suit, and that the foregoing amended and supplemental complaint is true as I verily believe.

F. B. NORMAN.

Subscribed and sworn to before me this 14th day of June, 1916.

(Seal)

E. L. McDOUGAL,
Notary Public for the State of Oregon.
My commission expires Sept. 23, 1919.

Filed June 14, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 8th day of July, 1916, there was duly filed in said court, and cause, a Stipulation that Motion to dismiss Bill of Complaint and to strike out, filed to original Bill of Complaint be deemed to be filed to Amended and Supplemental Bill of Complaint, in words and figures as follows, to wit:

STIPULATION AS TO MOTION TO DISMISS
AND TO STRIKE OUT.

It is hereby stipulated by and between the plaintiff, Ford Motor Company, by its attorneys, McDougal & McDougal, and the defendant, Benj. E. Boone & Company, et al., by their attorneys Messrs. Littlefield & Maguire, that the motions to dismiss and strike and make more definite and certain heretofore filed against the original complaint in said suit shall be construed to be re-filed as to the amended and supplemental complaint.

Dated this 3d day of July, 1916.

E. L. McDOUGAL,
Of Attorneys for Plaintiff.

LITTLEFIELD & MAGUIRE,
Attorneys for Defendants.

Filed July 5, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 5th day of July, 1916, there was duly re-filed in said Court and cause, pursuant to stipulation, Motion to dismiss Amended and Supplemental Bill of Complaint and to Strike out, in words and figures as follows, to wit:

**MOTION TO DISMISS AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT.
MOTION TO STRIKE OUT.**

Come now the defendants in the above entitled suit and move the court to dismiss the complaint heretofore filed against them, upon the grounds, and for the following reasons:

I.

That said complaint does not show any facts wherein and whereby it appears that the amount in controversy between plaintiff and defendant exceeds the sum of \$3000.00 exclusive of interest and costs.

II.

That said complaint does not state facts sufficient to constitute a cause of suit against the defendants, or any one of them.

III.

That said complaint does not state facts sufficient to entitle the plaintiff to the relief prayed for.

IV.

That said complaint does not show that the defendant, or any one of them, is selling or offering for sale, under the name of Ford, Fords, Ford Cars, Ford Motor Cars, or Ford Automobiles, or any products other than those which have before been manufactured by the plaintiff corporation.

V.

For the reason that in said complaint, the plaintiff endeavors to join more than one cause of suit.

VI.

To dismiss each and every portion of said complaint commencing with the word "and," in line 1, page 4, and ending with the word "used" in line 26, page 4, for the reason that the same is frivolous, impertinent, irrelevant and immaterial.

VII.

And dismiss all of that portion of Paragraph 15, designated as sub-division A, and all that portion of said Paragraph designated sub-division B, and all that said Paragraph, designated as sub-division C, and all that said portion of said Paragraph designated as sub-division D, for the reason that the same is frivolous, impertinent and scandalous, and has no bearing upon the cause of suit which the plaintiff could and would have against the defendants.

Attorneys for Defendants.

Filed June 12, 1916, and re-filed, pursuant to Stipulation, July 5, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on Monday the 17th day of July, 1916, the same being the 12th judicial day of the regular July term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER SUSTAINING MOTION TO DISMISS.

This cause was heard upon the motion of the defendant to dismiss the amended and supplemental bill of complaint herein, said plaintiff appearing by Mr. E. L. McDougal, of counsel, and said defendant appearing by Mr. Robert F. Maguire, of counsel; on consideration whereof, it is ordered and adjudged that said motion be and the same is hereby allowed.

And afterwards, to wit, on Monday, the 31st day of July, 1916, the same being the 24th judicial day of the regular July, 1916, term of said Court; present: the Honorable Charles E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to wit:

FINAL DECREE.

Now at this day come the defendants by Mr. E. V. Littlefield, of counsel, and move the court for a decree dismissing the Amended and Supplemental bill of complaint herein; and it appearing to the court that a motion filed by said defendants to dismiss the Amended and Supplemental bill of complaint was heretofore sustained by the court and that said plaintiff has failed to amend said bill of complaint or otherwise plead,

within the time fixed by the rules of this court, it is therefore,

Ordered, adjudged and decreed that the Amended and Supplemental bill of complaint herein be and the same is hereby dismissed and that said defendants do have and recover of and from said plaintiff their costs and disbursements herein taxed at \$36.10, and that they have execution therefor.

And afterwards, to wit, on the 18th day of September, 1916, there was duly filed in said Court and cause, an Opinion of the Court, in words and figures as follows, to wit:

OPINION.

Portland, Oregon, July 3, 1916.

R. S. Bean, District Judge (Oral) :

The case of Ford Motor Company vs. Boone was submitted on a motion for a preliminary injunction. The purpose of the suit, substantially is to restrain the defendant companies from obtaining Ford automobiles from so-called agents of the plaintiff company and selling them at a price less than the list price. Attached to the bill is a copy of the contract made between the Motor Company and its agents or sub-agents. The right to relief depends upon the construction of this contract. If it is a mere consignment contract and the title to these cars remains in the Ford Company then the defendants should be restrained from in-

ducing or persuading these agents to violate their contract.

Now, this contract is adroitly drawn, no question about that, and it attempts to control, not only the price at which agents or sub-agents of the company shall sell automobiles, but the persons to whom they shall sell them, and the territory in which they shall be sold. It purports to appoint certain persons agents or limited agents of the plaintiff company for the sale of automobiles within designated territories. It provides that the agents shall pay to the company 85% of the list price at the time the cars are consigned, in other words, shall pay the 85%, which is all the Ford Company gets or expects to get from the sale of their cars, at the time the cars are consigned and before they pass into the possession of the agent. In addition to that, the agent is required to pay the freight, and he is required to sell the cars at a price not less than the list price fixed by the company. It is further provided that all applications to purchase cars shall be forwarded by the agent, or so-called agent, to the company, and shall be approved by it before the sale is made. It is further provided that the agent shall pay the insurance on the cars and all expenses of maintaining the business, and that he shall not sell them at a less price than that fixed by the company. There are many other provisions in the contract but these are all that are necessary for present purposes. Now, as I said, the contract attempts to control the price at which the agent shall sell cars, not only the price at which he shall sell them but the territory in which they shall be sold and

the persons to whom sale shall be made, notwithstanding the fact that it requires the agent to pay for the cars in advance before they receive possession of them. In other words, when the agent complies with this contract and pays for the cars, the title vests in the agent, and they are his property from that time on. So the question presented under this contract, as I understand it, is whether a manufacturer can control the price at which his product shall be sold in the market. Upon that question there has been considerable discussion among economists, and some courts have held that a manufacturer has that right, but the question came before the Supreme Court of the United States in the case of *Dr. Miles Medical Company vs. Parke & Sons Company*, and it was there held that a manufacturer could not control the price at which his products were sold after he had once parted with the title thereto. In this medical case, the complainant was the manufacturer of certain medicines by a secret process, and it proposed to establish a minimum price at which sales should be made by its vendees, and by subsequent purchasers who trafficked in the remedy. To accomplish this result, it adopted two forms of contract, one with the wholesaler and another with the retailer, and stipulated in these contracts the price at which its product should be sold, and that the wholesaler should not sell to any one except to designated retailers and those approved by the manufacturing company. It was charged in the bill against Parke & Sons, who had acquired some of these goods and were threatening to sell them at cut-rate prices, or prices below those fixed by the man-

ufacturer, that they obtained possession of these goods from the wholesale and retail dealers by unlawful and fraudulent means, and that after they obtained possession of the goods, they advertised them for sale at less than manufacturer's price. It was also alleged that for the purpose of concealing the source of supply, they removed the identifying serial numbers so that it was impossible for the manufacturer to trace these goods and ascertain from whom the defendants received them.

This case went to the Supreme Court of the United States, and after a thorough consideration of the matter, the court held that the injunction should not issue. The medical company, under the law, had no right to control the price at which these goods should be sold in the market after it had once parted with the title.

The same doctrine was subsequently announced by the Supreme Court in *Bauer vs. O'Donnell* (229 U. S. 1) in the case of a patented article. So, whether we regard these cars as a patented article, or the plaintiff as a mere manufacturer, I can conceive no difference in substance between this case and the *Miles* case and therefore the injunction is denied.

There are some statements in the bill that the defendants are engaged in an unfair competition with the plaintiff, but the bill shows that it is engaged in selling the identical article manufactured by the plaintiff and it does not pretend or represent to sell any other or different article, and therefore it is not engaged in unfair competition, within the meaning of the rule that justifies a court of equity interfering, so I take it, un-

der this showing, preliminary injunction ought not to issue.

Filed September 18, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 18th day of September, 1916, there was duly filed in said Court and cause, a Petition for Appeal, in words and figures as follows, to wit:

PETITION FOR APPEAL.

To the Honorable R. S. Bean, District Judge:

The above named complainant, Ford Motor Company, a corporation, brings this, its petition, for an appeal to the Circuit Court of Appeals for the Ninth Circuit, and respectfully shows that on the 31st day of July, 1916, there was rendered and entered in the above entitled court, a decree dismissing complainant's bill in the above entitled suit and assessing defendants' costs at \$36.10, and in the proceedings had prior thereto in this suit and in the dismissal of said bill certain errors were committed to the prejudice of the plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition, wherein the above named plaintiff prays that this appeal may be allowed from the above entitled court to the United States Circuit Court of Appeals for the Ninth District for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this suit duly authenticated, may be sent to

said Circuit Court of Appeals and that all other proceedings in the above entitled District Court be suspended, stayed and superseded and that judgment and execution herein be stayed until the final disposition of said appeal in said United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 18th day of September, 1916.

E. L. McDUGAL,
Attorney for Plaintiff.

ALFRED LUCKING,

L. B. ROBERTSON,
Of Counsel.

Filed September 18, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 18th day of September, 1916, there was duly filed in said Court and cause, an Assignment of Errors, in words and figures as follows, to wit:

ASSIGNMENT OF ERRORS.

Now on this 18th day of September, 1916, comes the above named plaintiff and complainant, Ford Motor Company, a corporation, and says, that in the records and proceedings of said court in the above entitled action, and in the final decree made and entered herein on the 31st day of July, 1916, there is manifest error and for error the said complainant assigns the following:

I.

That the court erred in that it did not hold that by the admission of the motion to dismiss the bill the words "Ford," "Fords," "Ford Motor Cars," "Ford Cars," "Ford Automobiles," or "Ford Distributors," referred to in the bill of complaint, were trade names and rights designating authorized agencies of the complainant, whereby complainant's business and property were known and identified, and entitled to be protected as such and that the use by the defendants of the words "Ford," "Fords," "Ford Motor Cars," "Ford Cars," "Ford Automobiles," or "Ford Distributors," by them availed of, was calculated to mislead the public, inequitable, and should have been enjoined as a violation and infringement of complainant's rights.

II.

That the court erred in that it did not hold that by the admission of the motion to dismiss the bill, that representations of Ford agency, the use of the script word "Ford," and the Ford "winged pyramid" trademark, in connection with said agency representations all referred to in the bill of complaint, were trade names, symbols and rights, whereby the complainant's business and property were known and identified, and that the use by the defendants of the trade names, symbols and rights by defendants availed of, was calculated to mislead the public, inequitable and should have been enjoined as a violation and infringement of complainant's rights.

III.

That the court erred in that it did not hold that by the admission of the motion to dismiss the bill, representations of agency and the ability to obtain unlimited stock of new Ford automobiles from the complainant's factory, referred to in the bill of complaint, were complainant's trade rights and property and that the representations by the defendants, referred to in the bill of complaint, as having been made by them, the defendants, was calculated to mislead the public, inequitable and should have been enjoined as a violation and infringement of complainant's rights.

IV.

That the court erred in that it did not hold that by the admission of the motion to dismiss the bill of complaint, the complainant was entitled to protection in its right to contract with its agents to arrange for the sale of Ford automobiles, all in the bill of complaint referred to, and that defendants' interference was calculated to mislead the public, inequitable and should have been enjoined as a violation and infringement of complainant's rights.

V.

That the court erred in that it did not hold by the admission of the motion to dismiss the bill, that the words "Ford Auto Agents" was a trade name and symbol, the exclusive right to use it belonging to complainant and referred to in the bill of complaint as having been by it used, and that the use by the defend-

ants of said words referred to in the bill of complaint, as having been by them used, was calculated to mislead the public, inequitable and should have been enjoined as a violation and infringement of complainant's rights.

VI.

That the court erred in that it did not hold that by the admission of the motion to dismiss the bill, the complainant was equitably entitled to be protected in the sale of new Ford automobiles at the price fixed by the complainant, in accordance with the contracts, all in the bill of complaint referred to, and that the defendants by obtaining, advertising the sale of, and selling cars at less than the price fixed by complainant, all in the bill of complaint referred to, was calculated to mislead the public, inequitable and should have been enjoined as a violation and infringement of complainant's rights.

VII.

That the court erred in that it did not hold by the admission of the motion to dismiss the bill, that the complainant was equitably entitled to be protected in its contracts with its agents in that said contracts were consignment contracts and not sale contracts, as referred to in the bill of complaint, and that defendants' interference with said contracts, all in the bill of complaint referred to, was calculated to mislead the public, inequitable and should have been enjoined as a violation and infringement of complainant's right to contract.

VIII.

The court erred in that it did not hold that by the admission of the motion to dismiss the bill of complaint the complaint did not state a good cause of suit to which the defendants should be required to file their pleas and answers.

IX.

That the court erred in sustaining the motion to dismiss and directing that the bill of complaint be dismissed.

X.

That the court erred in not granting to complainant the relief prayed in the bill of complaint.

XI.

That the court erred in holding that the contract set up in the bill of complaint was not a consignment contract but was a contract of sale to so-called agents.

XII.

The court erred in holding that the complainant did not retain title to the cars under the contract in question until the bill of sale was given to the purchaser.

XIII.

The court erred in holding that the defendants should not be restrained from inducing or persuading plaintiff's agents from violating their contracts and

disposing of the cars at less than the price fixed by plaintiff under the terms of the contract.

XIV.

The court erred in holding that when the agent advances 85% of the price of the cars under the terms of the contract and possession of the car was delivered to him that he thereby obtained title and the car became his property.

XV.

The court erred in holding that the contract in question set up in the bill of complaint was illegal and invalid in so far as it undertook to fix the prices at which the car should be sold to the public.

XVI.

The court erred in holding that this case was governed by the decisions in the so-called Miles Medicine case and the Sanatogen case so-called.

XVII.

The court erred in holding that notwithstanding a solemn contract stipulating that the title should remain in the plaintiff until actual bill of sale was delivered to the purchaser nevertheless such stipulations could be disregarded and breached by the agents.

XVIII.

The court erred in holding that such stipulations that title should remain in plaintiff until bills of sale were delivered to the customer and that the persons advanc-

ing the 85% should only be agents for purposes of arranging the sales should and could be lawfully disregarded and breached and interfered with by third persons.

XIX.

The court erred in holding that it was illegal to fix the price at which patented articles like cars in question should be sold to the public by the agents.

XX.

The court erred in holding that under the contracts in question a complete and unqualified title passed to the agents or second parties in such contracts upon payment of the 85%.

XXI.

The court erred in holding that complete and unqualified title passed to such agents and that it was lawful for the defendants to procure agents to breach their express stipulations with reference to prices.

XXII.

The court erred when it did not hold that contracts in question were provisional agreements for sale only to be according to the explicit terms of such contracts.

XXIII.

The court erred in disregarding many of the express stipulations of the contracts, in question, and overruling and disregarding the same as illegal and invalid.

XXIV.

The court erred in not holding that under the contracts in question only qualified rights were passed to the agents or second parties until full compliance with the conditions prescribed in such contracts.

XXV.

The court erred in disregarding the right of the owner of personal property to sell it only upon such terms as he may see fit to stipulate.

XXVI.

The court erred in holding that an agreement between the parties by which the owner and manufacturer retains title until he delivers a bill of sale is invalid and may be disregarded.

XXVII.

The court erred in not granting plaintiff relief against defendants' willful interference with plaintiff's contract rights with its agents.

XXVIII.

The court erred in not holding that the facts in the case showed such willful and malicious interference by the defendants with plaintiff's business and agents as to entitle the plaintiff to relief therefrom in a court of equity.

XXIX.

The court erred in this even if a qualified title were passed to the second parties under the contracts in

question, in holding that a solemn contract governing the matter of resale prices should and could be lawfully disregarded and breached by second parties and interferred with by third persons.

XXX.

The court erred in holding that it was illegal to fix the resale price of patented articles.

XXXI.

The court erred in holding that a contract governing resale prices was substantially the same as a notice attached to the article.

WHEREFORE complainant prays that said decree of dismissal be reversed and that said court may be directed to enter a decree in accordance with the prayer of complainant's bill.

E. L. McDOUGAL,
Attorney for Complainant.

ALFRED LUCKING,

S. B. ROBERTSON,
Of Counsel.

Filed September 18, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on Monday the 18th day of September, 1916, the same being the 66th judicial day of the regular July, 1916, term of said Court; present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause, to wit:

ORDER ALLOWING APPEAL.

Ford Motor Company, a corporation, plaintiff herein, having filed herein and presented to the court its petition praying for the allowance of an appeal from the above entitled court to the United States Circuit Court of Appeals for the Ninth Circuit, and having submitted therewith the assignment of errors intended to be urged by it, praying also that a transcript of the record, proceedings and papers in this cause duly authenticated be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, and praying also that meanwhile all other proceedings in the above entitled District Court be suspended, stayed and superseded and that judgment and execution herein be stayed until the final disposition of said appeal in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit,

It is hereby ORDERED that the aforesaid appeal be and the same is hereby allowed, and it is further

ORDERED that a transcript of the record, proceedings and papers in this cause duly authenticated, be sent to the aforesaid United States Circuit Court of Appeals, for the Ninth Circuit, and it is further

ORDERED that all further proceedings in the above entitled District Court be suspended, stayed and superseded until the final disposition of said appeal in the aforesaid United States Circuit Court of Appeals, for the Ninth Circuit, upon filing an undertaking in the sum of One Thousand Dollars (\$1000) to be approved by the court.

It is further ORDERED that upon the filing of said bond judgment and execution be stayed until the final disposition of said appeal in the aforesaid United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 18th day of September, 1916.

R. S. BEAN,
United States District Judge.

Filed September 18, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 18th day of September, 1916, there was duly filed in said Court and cause, a Bond on Appeal, in words and figures as follows, to wit:

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, the Ford Motor Company, a corporation, as principal and Royal Indemnity Company, a corporation, as surety, acknowledge ourselves to be jointly in-

debted to Benjamin E. Boone, Inc., a corporation, Benjamin E. Boone, Benjamin E. Boone, Inc., a corporation, D. R. Boone and Nora Carlyle, a co-partnership, doing business as Benjamin E. Boone & Co., defendants in the above case, in the sum of One Thousand Dollars (\$1000) conditioned that

WHEREAS on the 21st day of July, A. D. 1916, in the District Court of the United States for the District of Oregon, in the suit pending in that court, wherein the Ford Motor Company, a corporation, was plaintiff, and Benjamin E. Boone, Inc., a corporation, Benjamin E. Boone, and Benjamin E. Boone, Inc., a corporation, D. R. Boone and Nora Carlyle, a co-partnership, doing business as Benjamin E. Boone & Co., were defendants, a decree was rendered against the said Ford Motor Company, dismissing its complaint and the said Ford Motor Company obtained an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree and a citation directed to said defendants, citing and admonishing them to be and appear at the session of the United States Circuit Court of Appeals, for the Ninth Circuit, to be held in the City of San Francisco, California, on the 18th day of October, 1916, next,

NOW if the said Ford Motor Company, a corporation, shall prosecute this appeal to effect and answer all damages and costs, if it fails to make its plea good,

then the above obligation to be void, else to remain in full force and effect.

FORD MOTOR COMPANY, a corporation.

By W. S. McNAMARA, Asst. Manager.

ROYAL INDEMNITY COMPANY, a corporation.

By HOWARD R. SHROYER,
Attorney-in-Fact.

This bond approved this 18th day of September, 1916.

R. S. BEAN, Judge.

Filed September 18, 1916.

G. H. MARSH, Clerk.

And afterwards, to wit, on the 19th day of September, 1916, there was duly filed in said Court and cause, a Praecipe for Transcript, in words and figures as follows, to wit:

PRAECIPE FOR TRANSCRIPT.

To G. H. Marsh, Clerk of the above entitled court:

You are requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal

allowed in the above entitled case and to include in such transcript of record the following:

(1) Complainant's amended and supplemental complaint.

(2) Stipulation that motion to dismiss original complaint shall stand as motion to dismiss amended and supplemental complaint.

(3) Motion to dismiss supplemental and amended complaint.

(4) Opinion of District Judge, Hon. R. S. Bean, on refusing temporary injunction.

(5) Decree dismissing complaint.

(6) Petition for Appeal.

(7) Assignment of Errors.

(8) Order allowing Appeal.

(9) Bond for Costs, etc.

(10) Citation on Appeal.

(11) Praecipe for Transcript.

Respectfully,

E. L. McDOUGAL,
Attorney for Complainant, Ford Motor Company.

Filed September 19, 1916.

G. H. MARSH, Clerk.

United States of America,
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that I have prepared the foregoing transcript of record on appeal in the case in which the Ford Motor Company, a corporation, is plaintiff and appellant, and Benjamin E. Boone, Inc., a corporation, Benjamin E. Boone, and Benjamin E. Boone, Inc., a corporation, D. R. Boone and Nora Carlyle, a co-partnership, doing business as Benjamin E. Boone & Co., are defendants and respondents, in accordance with the law and the rules of court, and in accordance with the praecipe of said appellant, filed in said cause, and that the said transcript is a full, true, and correct transcript of the said record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

And I further certify that cost of foregoing transcript of record is \$.for printing said record, and that the same has been paid by said appellant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this.day of.A. D. 1916.

Clerk.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,

Plaintiff and Appellant,
vs.

BENJAMIN E. BOONE, INC., a corporation,

BENJAMIN E. BOONE and BENJAMIN E. BOONE, INC., a corporation,

D. R. BOONE, and NORA CARLYLE, a co-partnership, doing business as BENJAMIN E. BOONE & CO.,

Defendants and Appellees.

BRIEF OF PLAINTIFF AND APPELLANT.

Upon Appeal from the United States District
Court for the District of Oregon.

PLATT & PLATT,
McDOUGAL & McDOUGAL,
Attorneys for Plaintiff and Appellant.

ALFRED LUCKING,
L. B. ROBERTSON,
HARRISON G. PLATT,
of Counsel.

Filed
APR 30 1917

R. D. Monckton

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,

Plaintiff and Appellant,

vs.

BENJAMIN E. BOONE, INC., a corporation,

BENJAMIN E. BOONE and BENJAMIN E. BOONE, INC., a corporation,

D. R. BOONE, and NORA CARLYLE, a co-partnership, doing business as BENJAMIN E. BOONE & CO.,

Defendants and Appellees.

BRIEF OF PLAINTIFF AND APPELLANT.

Upon Appeal from the United States District
Court for the District of Oregon.

STATEMENT.

Plaintiff in this suit is a Michigan corporation engaged in the manufacture of automobiles and auto-

mobile parts and selling the same under the general designation of "Ford."

In order to reach the widest market plaintiff has developed a highly organized and extensive system of agencies under which it appoints in the states, counties, towns and villages throughout the United States and elsewhere, where its product is sold, certain individuals, firms and corporations to act as its agents, each in a defined territory carefully specified in the contract of agency.

On the appointment of such agents plaintiff enters into written contracts with them, carefully defining the duties and powers of such agents and restricting their authority within certain limits.

Plaintiff does not sell its automobiles to wholesalers, dealers or others, but, through its said agents, itself sells directly to the individual member of the community who buys for his own use.

The Ford is perhaps, the most widely known automobile in the United States and agency contracts with the plaintiff are eagerly sought because the agent thereby secures the representation of a product sure to sell and out of which the agent can earn a sure and fixed commission. The widespread demand for Fords and the ease with which they can be sold makes an agency so desirable that agents will submit and agree to conditions in the agency

contract, and accept burdens which perhaps they would be unwilling to accept with any other automobile on the market.

The contract appears in full on pages eighteen (18) to thirty-seven (37), inclusive, of the transcript of record, and it will not be necessary at this point to copy that contract in full. It will, however, be proper to copy here portions thereof which have particular bearing on the questions presented by this appeal.

“1915—SUB-LIMITED AGENCY CON-
TRACT—1916.”

“THIS AGREEMENT, made at Highland Park, Michigan, this 2d day of August, 1915, by and between the Ford Motor Company, a Michigan corporation of Highland Park, Michigan, hereinafter known as the first party and Vick Bros. of Salem in the State of Oregon, hereinafter known as the second party, and S. E. Brune & Son of Woodburn, in the State of Oregon, hereinafter known as the third party, WITNESSETH:

“WHEREAS the first party is a manufacturer of a line of automobiles known as Ford automobiles and also of automobile parts and accessories, and

“WHEREAS the second party is the Limited Agent of the first party within certain territory including that hereinafter described for the sale of Ford automobiles and parts under certain defined and limited restrictions, and

“WHEREAS the third party has applied to the first party to be agent in certain territory hereinafter described, for the sale of said Ford automobiles and parts, and first and second parties are willing to appoint third party, with certain limited authority and upon the following terms and conditions only:

“APPOINTMENT AS SUB-LIMITED
AGENT.

“NOW, THEREFORE, this witnesseth:

“(1) That second party hereby designates and the first party hereby confirms the third party as Sub-Limited Agent with certain authority as herein expressly stated only, for the purpose of negotiating sales of first party’s product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

POWERS.

“(2) That third party shall have no au-

thority or power or duty whatsoever, except as herein expressly conferred.

“AUTOS ON CONSIGNMENT.

“(3) That first party will consign its Ford automobiles to the third party through the second party to be sold to users only, and not for re-sale, upon bills of sale to be executed by the first party only, as hereinafter provided.

“TERRITORY.

“(4) That third party shall arrange for sales of Ford automobiles only to residents of the following specified territory shown on the attached map, and no other, namely:

* * * * *

“DAMAGES FOR BREACH TERRITORIAL RESTRICTIONS.

“(5) The sales of Ford automobiles to residents outside of third party's own territory is a serious trespass upon the rights and earnings of other Limited Agents, and Sub-Limited Agents, and tends to destroy the organization and business of the first party, and therefore, it is agreed that the

territorial restrictions and limits set forth herein are of vital consequence to the first party and its business, as well as to the business of all other Limited Agents and Sub-Limited Agents, * * * * *

“PRICES.

“(6) Third party shall arrange for sales of Ford automobiles to users at the first party’s full advertised list prices only, current at date of sale, plus Fifty-three and 25/100 (\$53.25) Dollars for each automobile for freight charges and delivery expenses, plus the amount, if any, of any present or future United States tax or excise upon or in respect of each automobile or sale thereof. Wherever the words “List Price” are used herein they mean the latest retail selling price established or fixed by the first party.

* * * * *

“CHANGES IN PRICE.

“(9) The first party may change the list prices of any of its products at any time it may choose, and third party shall conform to such changes immediately upon receiving notice thereof, and in case of increase or reduction in such list prices first party shall

not be bound to make any allowance to third party in cases of automobiles shipped before such changes take effect, and the third party's commission on automobiles as yet unsold by him shall be the difference between the eighty-five per cent (85%) advanced by him on such automobiles and the new selling price, provided; that in case of a reduction in price there will be allowed to third party a proportionate rebate on his advances made on such automobiles as still remain unsold in his possession at the date of such reduction as to automobiles shipped to the third party within thirty days immediately before such date, but none as to those shipped prior to such thirty day period.

“ADVANCES.

“(10) Third party shall advance in cash to second party or first party as the case may be, eighty-five per cent (85%) of the full advertised list price at the time of the consignment of its automobiles to third party.

* * * * *

“TITLE OF AUTOS.

“(12) First party shall retain all and complete title to each automobile until actual

bill of sale, signed and executed by first party, has been delivered to the vendee, who shall be only a user; that is, one who has purchased for immediate use and not to re-sale the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile at less than such price shall be utterly void and shall pass no title whatsoever.

“LIEN FOR ADVANCES. INSURANCE.

“(13) Third party shall have a lien on each Ford automobile for the eighty-five per cent (85%) advanced by him on the same and for freight paid by him on the same, and shall keep and maintain insurance so as to protect himself against loss.

“RETAIL BUYERS’ ORDERS.

“(14) Third party shall take from each proposed purchaser of a Ford automobile and immediately forward to second party for the first party, a written order duly signed by him, upon the regular blank “Retail Buyers’ Order,” furnished by first party,

without alterations or changes except the filling in of blanks, and third party will make no arrangement for the sale of a Ford automobile without taking such written signed order.

“DEPOSITS OF AUTOS.

“(15) All deposits of money, checks, etc., on Ford automobiles made by proposed buyers shall be remitted immediately when received with Retail Buyers' Order to the second party for the account of the first party, who shall be the custodian thereof, and first party will make proper disposition thereof when the transaction is closed according to the rights of all parties.

“COMPANY MAY REJECT ORDERS.

“(16) The dealings of the third party with a proposed purchaser of an automobile or the taking of a signed order blank as herein required or a deposit or both, shall not constitute a sale, nor shall first party be bound to accept such order, but first party may wholly reject the same for any reason satisfactory to first party, and the proposed purchaser shall acquire no rights whatever in the automobile until delivery of the duly executed bill of sale as herein provided.

“WARRANTY.

“(18) Third party shall have no authority to make any warranty whatsoever of Ford automobiles, but the purchaser shall be referred to the provisions of the Retail Buyers’ Order and Bill of Sale in that behalf.

* * * * *

“CLAIMS AGAINST CARRIERS.

“(20) In case of damage to automobiles by carriers in transit to third party, collections from the carrier shall be made in the name of the first party as the owners of such automobiles—

* * * * *

“THEFT OR DAMAGE OF AUTOS. FIRST PARTY NOT LIABLE FOR DAMAGES.

“(22) Third party shall safely keep and he hereby agrees to save first party harmless against theft or damage of any kind to said Ford automobiles while in his possession under consignment and in consideration of his being granted this agency, he expressly agrees that he will bear all damage or injury arising from theft, accident, injury or other cause to said automobiles so consigned to him

while in his possession, or while in transit from first party or second party to third party.

* * * * *

“(24) The second party agrees to conspicuously display signs on and in his building and windows, designating that he is the “Limited Agent for Ford cars” for the territory specified herein and he shall advertise the first party’s product effectively in the local papers and give his immediate and careful attention to all inquiries and give good representation to all interests of first party in the territory aforesaid. Second party agrees not to advertise or trade in the first party’s product in such a way as to be an annoyance or injurious to first party or any of its duly appointed Limited Agents or Sub-Limited Agents, and that he will not repeat any such advertisements or publish any form of advertising containing matter to which the first party has objected, and that he will follow as closely as possible the advertising copy provided from time to time by the first party. When agency of second party is cancelled or terminated he agrees to remove all such signs and cease such advertising.” * * * * *

“PATENTS.

“(27) First party owns, and the Ford au-

tomobiles are manufactured under, and embody the following letters patent of the United States, or some of them, namely: * * * *

“COMMISSIONS.

“(28) As third party's commission for making such sales of Ford automobiles, first party will after payment by the purchaser, allow to third party (except in cases specified in sub-division nine hereof) fifteen per cent (15%) of such full advertised price list, and will allow to third party such freight and delivery charges, and United States tax or excise, if any, as aforesaid.

“ADDED COMMISSIONS.

“(29) First party agrees to allow and pay to third party the following additional commissions on the net amount of business he shall do hereunder during the term of this agreement upon Ford automobiles, but not on Ford parts, repairs or accessories, namely: No added commissions whatever when his said business shall total less than \$5,000.00, but when the third party shall have done such business (not including freight charges and not including his fifteen per cent (15%) commission) to the amount of \$5,000.00, his right

to additional commissions shall begin, and he shall be entitled to such added commissions as follows: * * * * *

“STOCK OF FORD PARTS.

“(31) Third party agrees that he will purchase from the first party on his own account and carry on hand at third party's place of business aforesaid a stock of Ford parts that will inventory at all times during the term of this agency contract, not less than Two Hundred Dollars (\$200.00) at the list price, and first party shall have the right to send its representative to inventory such stock of Ford parts as third party may have on hand, at any time during the term of this contract. First party may cancel this contract for any breach of this provision. Inasmuch as the reputation of Ford automobiles is often injured by the use therein of inferior parts not made or furnished by the Ford Motor Company, therefore, the third party also hereby agrees that all his purchases of parts of Ford automobiles shall be made, as to all parts listed in its parts catalogue, exclusively from the first party, and that he will not use, sell or recommend to Ford owners similar parts manufactured by others.

'DISCOUNT ON PARTS.

"(32) First party agrees to allow the third party a discount of Twenty-five per cent (25%) on all parts of Ford automobile listed in the Ford parts price lists, excepting on bodies, on which the discount shall be fifteen per cent (15%) only. These discounts are allowed in consideration of third party's agreement to carry stock as provided in subdivision thirty-one above, and in consideration of the other provisions of this contract.

* * * * *

"PAYMENTS AT HOME OR BRANCH OFFICE.

"(38) The third party agrees to take up all sight drafts with exchange drawn on him by the first party for automobile consignments or for shipments of parts, when shipments arrive or when sight drafts are presented, the intent hereof being that payments are to be made to the first party at its home or branch office, but if it elects to draw drafts, the same will be honored with exchange by third party.

* * * * *

"ESTIMATE OF AUTOS REQUIRED.

"(40) In order that the first party may

determine the prospective requirements of its business for the business year ending July 31, 1916, and may base its contracts for materials, etc., thereon, the third party agrees that he will require consignments of not less than 22 Ford automobiles for his said territory between the date hereof and July 31, 1916, to be shipped in the various months as per the following schedule, and he hereby makes requisition for such automobiles to be shipped as stated, namely: * * * * *

“METHODS OF TRANSACTING BUSINESS. SAME MAY BE CHANGED.

“(44) The intention of the parties is that third party shall transact his business with first party through the second party—receive the consignments of automobiles through second party, make advances to second party, make remittances and deposits through second party, make his reports and send his Retail Buyers’ Orders, receive his payments or commissions and the like through the second party, and generally transact his business under this contract through the second party; but all final authority and direction shall rest with the first party, who may order or direct any change in methods of business either in particular instances or in general, as it

may deem best, and the second and third parties shall conform thereto.

* * * * *

"CANCELLATION.

"(46) This contract shall continue in force and govern all transactions between the parties until July 31, 1916, but it is agreed that either the first or third party shall be at liberty, with or without cause, to cancel and annul this contract at any time upon written notice by registered mail to the other party and such cancellation shall also operate as a cancellation of all orders for automobiles, automobile parts or attachments which may have been received by the first party from the third party prior to the date when such cancellation takes effect.

"SALE OF AUTOS ON HAND AT TIME OF TERMINATION.

"(47) In case of the cancellation or expiration of this contract the first party may at its option retake possession of all such of the aforesaid automobiles as third party may have on hand on consignment, unsold at the date of such cancellation or expiration at the same time returning to him his advancements

on the said automobiles; or at the option of the first party it shall be the duty of the third party and he undertakes (for the purpose of winding up the affairs of his said Sub-Limited Agency) to take orders for the sale of such automobiles as he may have on hand unsold at the time of such cancellation or expiration the same to be made strictly under and in accordance with the terms of this contract provided, however, if, after reasonable effort on the part of third party to make such sale there shall remain on hand any such automobiles unsold after three months from date of such cancellation or expiration, then on request of third party and payment by him to first party of ten per cent (10%) additional of the list price first party will sell said automobiles to said third party and give him bill of sale thereof for his own use or for such other disposition as he may choose to make.

* * * * *

“NO WAVER OF THESE PROVISIONS.

“(49) The failure of the first party to enforce at any time any of the provisions of this contract, or to exercise any option which is herein provided, or to require at any time performance by the third party of any of the

provisions hereof, shall in no way be construed to be a waiver of such provisions, nor in any way to affect the validity of this contract or any part thereof, or the right of the first party to thereafter enforce each and every such provision.

“MICHIGAN CONTRACT.

“(50) This contract, it is agreed, is a Michigan contract and shall be construed as such.”

The contract referred to and thus quoted from is of the general class denominated as sub-limited agency contracts.

Those agents with a wider territory, whose jurisdiction covers the sub-limited agents, are called limited agents but are under the same general restrictions as the sub-limited agents.

Agents of the Ford Motor Company are required by their contracts not only to find purchasers for Ford automobiles but they are also required to maintain places of business and repair shops at which purchasers of Ford automobiles can obtain that class of service which the authorized agents of the Ford Motor Company are obligated by their contracts to give, and which purchasers of Ford automobiles are entitled to receive. In other words

purchasers of Ford automobiles obtain by their purchase not merely the machine, but a connection with all the agents of the manufacturer wherever situated, which entitles them, as owners of Ford automobiles, to the benefits of Ford service. Such purchasers acquire the right to service provided for by the twenty-fifth (25) condition of the contract between the plaintiff and its agents, wherein it is provided that, "Third party agrees that he will make repairs on all Ford automobiles in his territory, or coming into his territory, whether sold through him or not, and to perform the work promptly and in workmanlike manner."

The agent is further bound by his contract (Condition 21) to "maintain on his own account and at his own expense a place of business and properly equipped repair shop." He also agrees (Condition 31) to "carry on hand a stock of Ford parts."

When a person or corporation is appointed as a Ford agent and holds himself out to the public as such there follows a representation to the public that purchasers of Ford automobiles through such agent will receive not only the machine, but also the right to the class of service provided for.

In perfecting this service and apprising the public thereof plaintiff has adopted certain forms and styles of advertising and has spent large sums of money therefor, and has acquired and made use of

certain trade marks and as a result thereof these trade marks have come to the public to mean certain things and to indicate what we have attempted to describe as Ford service and to convey to the public the knowledge and belief that the person making use of these words, expressions and trade marks is an authorized agent of the plaintiff for the sale and distribution of its product.

The case comes before this court on bill of complaint and motion to dismiss. The motion confesses the truth of all the allegations of the bill, and in the argument before this court we are entitled to assume that the defendants concede and admit the truth of all the allegations of the bill, for that is the effect of their motion.

Defendants are charged, and, by their motion admit, that they have pretended to the public that they were Ford agents, when as a matter of fact they were not such agents. They are charged, and they admit by their motion, that they have misused the words, signs and trade marks of the plaintiff to the injury of plaintiff and deception of the public, and that the same was done "with the deliberately fraudulent intent and purpose of defrauding the plaintiff and its duly authorized agents and of misleading the public and prospective purchasers of Ford automobiles to believe that said defendants are authorized to arrange for the sale of Ford Automob-

biles in Portland, Multnomah County, Oregon, and elsewhere, and to mislead and deceive said prospective buyers into the false supposition that they are entitled to receive from defendants all the benefits which they might lawfully receive from bona fide agents of this plaintiff." (Transcript p. 13.)

It is further charged and admitted by the bill that the defendants importuned agents of the plaintiff

"to breach their said contract with plaintiff herein and did in collusion with said agents, fraudulently cause to be made and sent in to plaintiff's factory branch, fictitious orders for Ford cars and forthwith caused the Ford cars ostensibly ordered by said persons for disposition in vicinities of Woodburn, Marion County, Oregon, and Kelso, Cowlitz County, Washington, and elsewhere, to be driven or shipped by a roundabout course without plaintiff's knowledge, to the defendants' place of business said automobiles, all for the purpose of obtaining fraudulently, unfairly and in violation of the rights and contracts of plaintiff, and its authorized agents, certain Ford cars for the purpose of lending color to the false and fraudulent representations of defendants that it is plaintiff's authorized agent in the territory wherein defendants'

place of business is located." (Transcript pages 10 and 11.)

There are other charges in the bill in detail showing other acts and things done by the defendants for the purpose of injuring the plaintiff.

It is apparent from the record and from the opinion of the District Court, found on pages 44 and 47 of the transcript, that the trial court conceived and held that the contract between the plaintiff and its agents was not what its language meant, but instead thereof evidenced an absolute sale by the plaintiff to the particular agent, and an attempt to control the price and conditions of a subsequent sale by the agent to a member of the public, in violation of the Act of Congress of July 2, 1890, known as the Sherman Anti-Trust Act. It becomes therefore, necessary to take this contract by its four corners and ascertain from the terms and provisions thereof whether the contract is what it purports to be—a contract for the purpose of appointing an agent and providing for the consignment to such agent of automobiles for sale by the plaintiff through its agent to the public or whether the court is justified upon the bill and motion to dismiss, to infer and hold that the contract of agency is not what it purports to be, but a mere subterfuge to conceal a sale for the purpose of enabling the manufacturer to control the prices at which dealers shall vend Ford automobiles to the general public.

It is the contention of the plaintiff not only that the contract is a bona fide contract of agency and consignment and to be interpreted according to the language and intentions of the parties, but that the court is limited to the consideration and construction of the actual contract made and may not construe some other different contract which counsel may think or claim or suggest as the real contract, made under cover of an agency contract, for the purpose of evading the Sherman law.

ASSIGNMENT OF ERRORS.

The Transcript of Record shows that the appellant has made thirty-one assignments of errors. Numbers six to thirty-one inclusive present in varying phraseology and possibly with some apparent repetition the main points relied on to sustain this appeal. The first five errors assigned, though relied on, are of minor importance as compared with the main questions involved in this case.

Briefly stated the plaintiff will maintain that error was committed in not holding that the words "Ford," "Fords," "Ford Motor Cars," "Ford Automobiles" or "Ford Distributors' " and the script word "Ford" and the Ford "winged pyramid" trademark were trade names, symbols and rights and that

they were being wrongfully and illegally used by defendants in refusing to enjoin their further use in the manner set forth in the complaint.

That error was committed in denying validity to a solemn contract, and in the refusal of the court to enjoin defendants from persuading the parties to that contract to breach the same and otherwise violating the rights of plaintiff as set forth in the complaint.

The court further erred in holding the result of that contract to be a sale rather than what the contract specified and contemplated.

The court erred in holding that plaintiff did not have the right to fix the prices at which the agents under said contract should sell the product of plaintiff's factories and that the attempt to do so violated the Sherman law.

The contract shown in the record is the basis of plaintiff's plan of marketing its product and most of the questions raised lead to the contract, and upon its validity depends the right of plaintiff to do business as now organized under the plan of consigning goods to agents with limited authority to sell for it.

But the other errors relied on raise the further question that if the agency contract be construed as

a sale to the agent, nevertheless it must be held to be a sale subject to the restrictions lawfully imposed by plaintiff.

POINTS AND AUTHORITIES.

I.

Defendants, by their motion to dismiss have admitted the truth of all the allegations of the complaint.

II.

The unauthorized and wrongful use of the trade name and trade mark of plaintiff, and other similar words or phrases, for the purpose of diverting plaintiff's trade from plaintiff or its duly authorized agents constitutes unfair competition, and an injunction should be granted against its continuances.

Ford Motor Co. v. Fred Buck, (unreported case), U. S. District Court, Northern District of Illinois, Eastern Division, Dec. 3, 1914.

C. F. Simmons Med. Co. v. Mansfield Drug Co., 93 Tenn. 84.

Consolidated Ice Company v. Hygiene Distilled Water Co., 151 Fed. 10.

Nims on Unfair Business Competition. pp. 9-28-31-35.

III.

An actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and, in the absence of an adequate remedy at law, equitable relief will be granted.

Angle v. Chicago, St. Paul M. & O. Ry. Co. 151 U. S. 1, 38 L. ed. 55.

Bitterman v. Louisville & Nashville Ry. Co. 207 U. S. 1, 38 L. ed. 171.

IV.

The contract set out in the complaint creates an agency and results in a bailment to the agent, not a sale.

Strum v. Boker, 150 U. S. 323, 37 L. ed. 1093-9.

Cole Motor Car Co. v. Hurst, 228 Fed. 280 (C. C. A.)

Harris v. Coe, 71 Conn. 163, 41 Atl. 554.

V.

A manufacturer has the right to fix the prices at which its sales agent shall sell and in the territory in which it may sell.

Virtue v. Creamery Package Mfg. Co. 227 U. S. 8, 57 L. ed. 393.

Waltham Watch Co. v. Keene, 202 Fed. 225, 240.

Cole Motor Car Co. v. Hurst, 228 Fed. 280, (C. C. A.)

Whitwell v. Continental Tobacco Co., 125 Fed. 454.

VI.

A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.

Cincinnati P. B. S. & P. Packet Co. v. Bay, 200 U. S. 184, 50 L. ed. 432.

Hobbs v. McLean, 117 U. S. 567, 29 L. Ed. 940.

VII.

Where the contract does not in its terms create

a restraint of trade, some evidence of an unlawful intent becomes essential.

Bigelow v. Calumet & Hecla Mining Co., 167 Fed. 728 (C. C. A.).

Cincinnati P. B. S. & P. Packet Co. v. Bay 200 U. S. 179-184, 50 L. ed. 428.

VIII.

A patentee has an exclusive right to make or use or sell the patented article or to permit to others those rights or any one or any part of them.

Paper Bag Patent Case, 210 U. S. 424, 52 L. ed. 1122.

Bement v. National Harrow Co. 186 U. S. 70, 46, L. ed. 1059.

IX.

Courts are unwilling to put limits on the exercise of the privileges granted to a patentee by law, recognizing that as a function of Congress.

The Button Fastener Case, 77 Fed. 288-294.

X.

Even if the contract could be construed as effecting a sale to the agent, nevertheless such sale

would be a sale subject to conditions and restrictions and the courts recognize the right of a patentee to attach conditions to a sale of the patented article.

Keeler v. Standard Folding Bed Co. 157 U. S. 657, 39 L. ed. 848.

Bement v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1059.

XI.

Only a sale **without condition or restriction** will pass the patented article out from under the monopoly which the law secured to the patentee. This limitation is recognized in all the cases.

Henry v. Dick Co. 224 U. S. 1, 56 L. ed. 645.

Bement v. National Harrow Co. 186 U. S. 70.

Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041.

Bobbs-Merrill Co. v. Strauss, 210 U. S. 339, 52 L. ed. 1086.

Dr. Miles Medical Co. v. John D. Park & Sons, 220 U. S. 373.

XII.

An agent or vendee of a patentee may, by direct

covenant or agreement, be bound to the observance of price restrictions, imposed as a condition upon which right of sale is exercised.

National Phonograph Co. v. Schlegel, 128 Fed. 733.

Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co. 154 Fed. 359 (C. C. A.).

American Graphophone Co. v. Boston Store, 225 Fed. 785.

XIII.

Competition is not affected by a contract between a patentee and his agents whereby the sale price is fixed.

Blount Mnfg. Co. v. Yale & Towne Mnfg. Co. 166 Fed. 555.

Virtue v. Creamery Package Mnfg. Co. 227 U. S. 32, 57 L. ed. 393.

XIV.

In all the cases is found a recognition of the **distinction** between the right of a patentee to fix prices by **direct contract** and the attempt to do so by **mere notice** affixed to the article.

Dr. Miles Medical Co. v. John D. Park & Sons,
220 U. S. 373.

Bauer v. O'Donnell, 229 U. S. 1, 57 L. ed. 1041.

Bobbs-Merrill Co. v. Strauss, 210 U. S. 339, 52
L. ed. 1086.

United States v. Keystone Watch Case Co.
218 Fed. 502.

“TRUST LAWS AND UNFAIR COMPETITION” issued by the Government Printing Office in 1916, pp. 579-580, 592-593, 651-652.

XV.

But if we should concede the construction of the contract asserted, nevertheless there has been no restraint of trade as measured by the rule of reason.

Whitwell v. Continental Tobacco Co. 125 Fed.
454 (C. C. A.).

Phillips v. Iola Portland Cement Co. 125 Fed.
594-5 (C. C. A.).

Bigelow v. Calumet & Hecla Mining Co. 167
Fed. 704-712.

Cole Motor Car Co. v. Hurst, 228 Fed. 280
(C. C. A.).

O'Halloran v. American Sea Green Slate Co.
207 Fed. 187-190.

United States v. Hamburg-American S. S.
Line, 216 Fed. 971-2-4.

United States v. Reading Co. 226 U. S. 324,
57 L. ed. 243.

Nash v. United States, 229 U. S. 373, 57 L. ed.
1232.

ARGUMENT.

I.

This suit is an application to the Court by the Plaintiff for relief against the Defendants by way of injunction restraining Defendants from violating certain rights of Plaintiff. The matter comes before this Court upon the Bill of Complaint and a Motion to Dismiss, and, of course, the rule applies that by a Motion to Dismiss the Defendants admit the truth of all the allegations of the complaint, and contest only the sufficiency of those allegations to entitle Plaintiff to relief in a court of equity.

Plaintiff has invoked a rule that is said in **Dr. Miles Medical Co. v. Park**, 220 U. S. 394, 55 L. ed. 513, to be

“the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and that, in the absence of an adequate remedy at law equitable relief will be granted.” *Sarah R. Angle v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.* 151 U. S. 1, 38 L. ed. 55; *Marcus K. Bitterman v. Louisville & Nashville Railway Co.* 207 U. S. 205, 52 L. ed. 171, 12 A. & E., Ann. Cases 693.

It appears from the complaint that the plaintiff has developed and perfected a system of selling the automobiles manufactured by it, and in carrying out that system, it appoints numerous agents and enters into contracts with them, and a copy of that contract is set out in the record and made a part of the complaint.

It is the contention of the plaintiff that this contract is only what it purports to be, a contract of agency and bailment between the plaintiff and its agents. The District Court held that the contract resulted in a sale from the plaintiff to its agents of the automobiles consigned by the plaintiff to its agent, that the absolute and unconditional property passed from the plaintiff to the agent, and that the automobiles thereby became the agent's automobiles, to do with as he chose, notwithstanding the

existence of the contract. In effect, the Court held that the contract was a subterfuge adopted for the purpose of concealing the true nature of the transaction, under the guise of an agency, for the purpose of projecting plaintiff's control over the subsequent disposition of the automobiles by the agent.

Disregarding the fact that the contract between the plaintiff and its agent is clear and definite in all its terms, and precise in its use of language, and no word can be found therein which even squints at a transaction of sale, nevertheless the language was construed to be a cover for an ulterior purpose of evading the law against combinations in restraint of trade.

From the premise that the transaction was a sale, thus assumed, the Court drew the conclusion that the transaction, or series of transactions, carried on under this and other similar contracts, were in restraint of trade and in violation of the Sherman Law. We believe it is capable of demonstration that the transaction was only what it purports to be—a contract of agency and bailment between the plaintiff and its agent, and that, therefore, the Sherman Law has no application to transactions under such contract, but further that the negative argument thus imposed upon us is a violation of the rule that a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established

facts, and that it was incumbent upon our opponents to demonstrate in some way, and offer some facts to support the claim that the transaction was actually a sale under cover of an agency contract, and we contend further that even if it should be held that the net result of the transaction between the plaintiff and its agent was a sale by the plaintiff to the agent of the automobiles manufactured by the plaintiff, nevertheless the transaction was not obnoxious to the Sherman Law, as interpreted by the Supreme Court.

It is the position of the plaintiff that the agency contract under which it consigns automobiles to its agents creates a contract of bailment between plaintiff and its agents, and that thereunder the automobiles remain the property of the plaintiff until sales have been arranged by the agent on behalf of the plaintiff under the terms of the contract itself, and upon conditions specifically set forth.

II.

THE CONTRACT ITSELF.

We rely upon the provisions of the contract itself as demonstrating that a bailment is the relationship created by the contract between the plaintiff and its agent. The preamble states:

“Whereas the second party has applied to

the first party to be the agent in certain territory hereinafter described for the sale of said automobiles and parts, and the first party is willing to appoint second party with certain limited authority upon the following terms and conditions only."

Thereupon follow paragraphs appointing the agent—

(1) "With certain authority as here expressly stated only, for the purpose of negotiating sales of the first party's product to users only, in the methods and upon the terms and within the territory herein specifically set forth.

(2) "That the third party shall have no authority or power or duty whatsoever, except as herein expressly conferred.

(3) "That first party will consign its Ford automobiles to the third party through the second party to be sold to users only, and not for resale, upon bills of sale to be executed by the first party only, as hereinafter provided."

The next paragraph limits the territory in which the agent may sell, and there follows a statement of agreed damages and penalties for any violation of the territorial restriction.

It is further provided that the agent will arrange for sales of Ford automobiles to users at the first party's full advertised list prices only, and the right is reserved by the plaintiff to change the list prices of any of its products at any time it may choose, and the duty is imposed upon the agent to conform to such changes immediately upon receiving notice thereof.

The tenth condition of the contract is presumably the basis of the inference that the contract constitutes a sale only, and that all the other provisions thereof are subterfuges to conceal the sale.

(10) "Third party shall advance in cash to second party or first party, as the case may be, 85 per cent of the full advertised list price at the time of its consignment of automobiles to third party."

The next condition provides that the agent shall pay all freight from the factory to the agent's place of business, but the thirteenth condition provides that the agent shall have a lien on each automobile for the 85 per cent advanced by him and for the freight paid by him, and he is required to maintain insurance to protect himself against loss.

The twelfth condition of the contract provides that the plaintiff shall retain complete title to each automobile until actual bill of sale signed and exe-

cuted by it has been delivered to the vendee secured by the agent, and that such vendee must be one who has purchasd for use, at full list price plus freight and delivery charges, and that any attempt to sell or dispose, or deliver any Ford automobiles at less than such price, should be utterly void and pass no title.

Condition 14 of the contract requires that the agent shall take from proposed buyers a signed order to be transmitted to the plaintiff, which reserves the right to accept or reject the same for any reason satisfactory to it. (Condition 16.)

It will be noted in the clauses thus stated that by the contract the agent has no authority except that expressly conferred and that the agent receives a consignment of automobiles which are to be sold by the plaintiff not the agent, upon bills of sale executed by the plaintiff, and the contract expressly provides that the duties of the agent are to arrange for sales of automobiles, retaining in the hands of the plaintiff the power to sell or refuse to sell, and to change the prices of its product at any time it may choose.

The fact that an agent, desiring to obtain the agency for the handling of Ford automobiles, is willing to, and does agree to onerous conditions, does not justify an inference that the cash advanced by him pursuant to the contract was not actually

an advance, but a payment, whereby the title passed and the agent became the actual owner of the automobiles consigned.

It has always been a rule of law that contracts are construed to mean what they say. If the language used is simple, and the intention expressed is clear, then such contracts are enforced as expressed, if no violation of the law is thereby accomplished. Applying these rules, there can be no question but that the plaintiff clearly and effectually retained title to consignments of automobiles to the agent until all the conditions of the contract were fully complied with. It is violative of the language of the contract, and it is an inference from nothing contained in the record, to assume that the advance of 85 per cent, provided for in the contract, was not what the parties contracted it to be, but a payment of the full purchase price, resulting in a sale. Why should the agent contract, as in Condition 13, for a lien for his 85 per cent advance if by the transaction he became the owner of the automobiles? The owner of property cannot and need not for any advantage to himself, have a lien upon his own property, and the agent in the contract under consideration expressly accepted a lien on the automobile for his 85 per cent advance, and thereby expressly waived any claim to be the owner thereof.

A reading of the contract will disclose further conditions which negative the contention that the

agent became the owner of the automobiles, and not a word anywhere in the contract, directly or by logical inference, from which the affirmative of that proposition can be even inferred.

Condition 19 provides that the agent shall have no authority to warrant any of the automobiles, although warranty is an incident of ownership, and Condition 21 provides that in case of damage to automobiles by carriers in transit to the agent, collection from the carrier shall be made in the name of the plaintiff as the owner of such automobiles, thus affording another conclusive indication of ownership in plaintiff.

By contrast, Condition 31 shows the careful choice of language by the parties to this contract. Automobiles could come into the agent's hands by consignment only, but parts he was required by this paragraph of the contract to **purchase** and carry on hand.

Condition 24 provides for signs and advertising by the agent under the direction of the plaintiff and a removal and discontinuance thereof at the termination of the agency.

Condition 47 of the contract contains another and also a conclusive demonstration of the proposition that the contract was a true consignment and not a sale, wherein it is provided that in event of cancellation or expiration of the contract, first

party to the contract, (the plaintiff) may at its option re-take possession of all such automobiles as the third party, (the agent) may have on hand on consignment unsold at the date of such cancellation or expiration, at the same time returning to him his advancements on the said automobiles, or at the option of the first party, it shall be the duty of the third party, to endeavor to sell such remaining automobiles, notwithstanding the expiration of the contract, but if, at the end of three months he shall not have made such sales, the first party agrees on request of the agent, upon payment of 10 per cent additional of the list price, to sell said automobiles outright to the agent.

A contract right on the part of the consignor to take back property sold and return the consignee advances is as clear a negative of the assertion that the transaction was a sale by which the title passed as it is possible to conceive of, and if title had already passed and the automobiles became the property of the agent, why should he pay an additional 10 per cent, or receive a bill of sale of property already his?

By the preceeding clause of the contract, (Condition 46) either party to the contract, "shall be at liberty, **with or without cause**, to cancel and annul this contract at any time."

If a sale had taken place as to automobiles con-

signed to and in the agent's hands, nothing would remain on a cancellation of the contract except to settle any balances not adjusted and the Ford Company could not re-take by refunding the price.

But Conditions 46 and 47 are not capable of such an interpretation, and demonstrate that there was no sale, and that the Ford Company could at its option re-take its machines and refund to the agent his advances.

The plaintiff in this case has deemed it to be for the best interests of its trade to retain itself control of the distribution of its product to actual users thereof rather than to sell the same outright to wholesalers and retailers and permit them to distribute on such terms as they may see fit.

Plaintiff believes that it is for the advantage of the manufacturer of a product of wide and general use by the public, to so deal with the public that each member thereof may feel that he is receiving as good consideration and treatment as each and every other member of the public, and only by retaining in its own hands contact with ultimate consumer can this uniformity of treatment be secured.

III.

UNFAIR COMPETITION.

This very proper desire on the part of plaintiff

to protect the public constitutes one very potent reason for the objection urged against the unfair competition charged against defendants in doing the acts complained of in paragraph XV of the complaint (Transcript of Record, pp. 9 et seq.) subdivision (a), (b), (c), (d), (e), (f).

The grounds of relief discussed in parts III and IV of this brief seem to have been ignored by the District Court.

Defendants by the motion to dismiss admit that the acts complained of were done "with the deliberately fraudulent intent and purpose of defrauding plaintiff and its duly authorized agents and of misleading the public * * * and that said sign displayed as above mentioned * * * (and other acts set out) have been done * * * with the fraudulent intent and purpose on the part of defendants of defrauding plaintiff and its authorized agents and the public" (Transcript of Record, pp. 12-13).

It is unnecessary to quote from the decided cases to demonstrate that such conduct was unfair competition and should be enjoined by a court of equity.

Nims on Unfair Business Competition, pp. 9-28-31-35.

IV.

IRRESPECTIVE OF THE QUESTIONS

ARISING OUT OF THE PATENTS INVOLVED, WE SUBMIT THAT PLAINTIFF'S LIMITED AGENCY CONTRACT AND OTHER CONTRACTS WITH ITS AGENTS CONSIGNING FORD CARS TO THEM AND GRANTING TO EACH AGENT THE EXCLUSIVE PRIVILEGE OF ARRANGING FOR SALES OF FORD CARS WITHIN ANY PARTICULAR OR ALLOTTED TERRITORY, ARE VALID AND WILL BE PROTECTED BY THE COURTS, AND THAT THE DEFENDANTS WERE GUILTY OF UNWARRANTED AND MALICIOUS INTERFERENCE WITH SUCH CONTRACT RIGHTS.

There is no doubt of the vicious and unlawful acts of the defendants in inducing plaintiff's agents to break their contracts. There is no doubt that law and equity both denounce and give remedies for wrongs in all such cases—the only question being as to whether the particular contract is valid.

There is no authority against the validity of the plaintiff's contracts allotting particular territory to particular sales agents. It is simply a question of whether the public rights in freedom of trade have been violated.

An examination of the bill of complaint discloses that plaintiff's grants to each of its licensed agents

a particular and exclusive territory within which such agent is licensed to solicit and arrange sales of Ford cars. The licensed agent in return agrees that he will only solicit and arrange for sales within this particular territory. The courts uniformly uphold contracts granting an exclusive agency within a limited territory.

Wood, etc., Machine Co. v. Greenwood Hardware Co. 75 S. C. 378, 9 L. R. A. (N. S.) 501.

Keith v. Optical Co. 48 Ark. 138.

Roller v. Ott, 14 Kan. 609.

Newell v. Meyendorff, 9 Mont. 254.

Ewing v. Sewing Machine Co. 9 W. N. C. 272.

The bill shows clearly the persistent and continuous efforts of defendants to procure automobiles from the licensed agents in violation of their contracts with plaintiff, and by inducing them to break such contracts by sending in to plaintiff fictitious orders and by inducing them to deliver such consigned automobiles outside their own territory to defendants, and widespread advertisements of defendants offering to sell such Ford automobiles so wrongfully obtained at reduced prices, regardless of the territory, thereby injuring and demoralizing the business of plaintiff and its agents.

Furthermore, we submit that the trading stamp cases and the ticket scalper cases, so-called, together with the general principles of equitable jurisdiction afford authority for enjoining the Defendants quite independent of the questions arising under the patents.

Sperry v. Mechanics Co. 128 Fed. 800.

Sperry v. Pommer, 109 Fed. 309.

Sperry v. Feuster, 219 Fed. 757.

Bitterman v. L. & N. Ry. Co. 207 U. S. 205.

Nashville Ry. Co. v. McConnell, 82 Fed. 52.

Illinois Central v. Caffrey, 128 Fed. 77.

RECENT DECISIONS INTERPRETING THIS CONTRACT.

In the unreported case of Ford Motor Co. v. Fred Buck, in the United States District Court for the Northern District of Illinois the facts were almost identical with those in the case at bar. The same contract was involved and upon a full hearing a perpetual injunction was granted. No opinion was filed but the following decree was entered:

THIS CAUSE duly came on to be heard at this term upon the bill, answer, replication, and proofs; and the Complainant appearing by **L. B. ROBERTSON**, Esquire, and **MARQUIS EATON**, Esquire, its solicitors, and the Defendants appearing by **A. A. Rolf**, Esquire, their solicitor, and the Court having heard the arguments of counsel and being fully advised in the premises,

And it appearing to the Court:

That Complainant, Ford Motor Company, is a corporation organized and existing under and by virtue of the laws of the State of Michigan and transacting business in said State of Michigan and divers other states and territories of the Union; that Complainant has duly complied with all the laws of the State of Illinois, pertaining to foreign corporations doing business in Illinois; that Complainant and Defendants, respectively, have places of business and are transacting business in the City of Chicago, in the Northern District of Illinois, Eastern Division, and that the amount in controversy between Complainant and Defendants exceeds the sum of Three Thousand Dollars;

And that for many years, to-wit, eleven (11) years last past, Complainant has been engaged in the manufacture and vending of automobiles and automobile parts, in particular manufacturing, and

vending the automobile known as "Ford" and incidental parts thereof;

And that Complainant has expended large sums of money in advertising its product under the name "Ford"; that as a result of such advertising and of the merit of Complainant's product the words "Ford," "Ford Motor Cars," and "Ford Cars" have come in the public mind to mean and to designate the automobiles so manufactured and vended by Complainant;

And that in the conduct of its business Complainant has made use of certain trade-marks among them a certain trade-mark known, to the trade and to the public, as the "Winged Pyramid," carrying in script the word "Ford"; and among them also the word "Ford" so written in script; .

And that Complainant caused said trade-mark, word, and design to be duly copyrighted and registered under the laws of the United States and foreign countries; that Complainant has become and is entitled to the exclusive use and control of such trade-mark, word "Ford," and design in connection with the manufacture and sale of automobiles and automobile parts, and the right to control and limit the use thereof to such person or persons as in its discretion it desires to authorize to use the same;

And that in the conduct of its said business

Complainant appoints in divers States, Counties, Cities, and Towns throughout the United States certain corporations, firms and individuals to act as its agents in certain territory to arrange for the sale of its product, and pays to said corporations, firms and individuals, so appointed, as agents, certain commissions for their services; that in appointing such agents Complainant by contract consigns and allots certain territory to certain agents and that in said contracts said agents agree that they will not arrange for the sale of Complainant's product in the territory of any other agent so appointed by Complainant and will not arrange for the sale of Complainant's product in any territory not allotted to them in their respective contracts; that Complainant selects such persons to act as its agents as will carry out and observe the provisions of said contract and whom it may recommend to the public as reliable persons, not only in arranging for the sale of Complainant's product but also in the giving of proper service in the up-keep thereof;

And that agents of Complainant are required and do conspicuously display signs, designating that they are agents for "Ford Cars"; that as a result of the large amount of business transacted by the Complainant and the merit of its product and its extensive advertising, certain phrases and expressions have come to mean, to the trade and to the public, that the person making use of such word, phrases and expressions is an authorized agent of

Complainant; that among such words, phrases, and expressions, are the following:

The use on windows of the word "Ford."

The use on windows of the word "Ford" in dress and style imitative or resembling the trade-mark of Complainant above referred to.

The use on business cards and letter-heads of the word "Ford," of the words "Ford Cars," or the words "Ford Distributors."

And that Defendant, Fred Buck, is the owner and proprietor of a garage located in Chicago, Illinois, at, to-wit, Barry Avenue and North Clark Street, known and operated as "Barry Sales Co."; that said designation, Barry Sales Co., is but a name and style under which said Defendant, Fred Buck, carries on a general automobile business;

And that neither Fred Buck, doing business under the name and style of Barry Sales Co., or Fred Buck individually, are authorized by Complainant to be its agent for the territory in which said place of business is located or in any other territory;

And that the Defendant, Fred Buck, doing business under the name and style of Barry Sales Co., and the Defendant, Fred Buck, individually, al-

though well knowing the business system, trade-marks and the rights therein of the Complainant, have made use of the word "Ford," the words "Ford cars," the words "Ford distributors" and other similar words and phrases, and have imitated the dress and style of Complainant's trade-mark above mentioned, in various manners and at various times up to the filing of the Bill of Complaint herein, for the purpose of diverting Complainant's trade from Complainant and its duly authorized agents to said Defendants by leading the trade and the public, particularly prospective purchasers of "Ford automobiles," to believe that the Defendants were agents authorized by Complainant to arrange for the sale of "Ford automobiles," and of leading such prospective purchasers into the supposition that such prospective purchasers would be entitled to receive from said Defendants all the benefits which are provided by Complainant and its authorized agents to users of "Ford automobiles," and have threatened so to do, all to the benefit of said Defendants and the irreparable injury of the Complainant; and that each and all of the allegations of the said Bill of Complaint are true.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Defendant, Fred Buck, doing business under the firm name and style of Barry Sales Co., and Fred Buck, individually, their agents, attorneys, servants, and employes

be, and they are hereby, perpetually restrained and enjoined from:

1. Making, advertising, or circulating any statement or representation to the effect that Defendants are agents for the sale of Ford cars in Chicago, Illinois, or elsewhere.

2. Using on any window, sign, business card, letter-head, or using in any other manner whatsoever, the word "Ford" in dress and style imitative of Complainant's trade-mark.

3. Employing any sign, banner or other device bearing or containing the words "Ford," "Ford cars," "Ford distributors," or other combination of the word "Ford" with other words or expressions implying that Defendants are authorized agents to handle Ford cars.

4. Representing indicating, or implying that Defendants have any relations or dealings with the Complainant's factory at Detroit or with the Chicago branch of Complainant's business or with any other branch of Complainant's business in any other city of the United States.

5. Acquiring a secret or undisclosed interest in any authorized agency of Complainant to arrange for the sale of Ford cars and from

inducing or attempting to induce any authorized agent of Complainant to arrange for the sale of Ford cars in violation of any of the terms of the contract of such agent with Complainant, and from inducing or attempting to induce any authorized agent of Complainant to breach his or its contract of agency with Complainant in any particular.

AND IT IS FURTHER ORDERED that Complainant do have and recover from Defendants its costs and disbursements in this suit to be taxed by the Clerk in due course and that a writ of execution issue therefor.

November Term, A. D. 1914.

December 3rd, 1914.

ENTER KENESAW M. LANDIS,

Judge.

We submit that this is based upon a correct interpretation of the law pertaining to the right of Plaintiff to control the use of its name and trademark, as well as the sale and distribution of its cars.

In *Orebaugh v. Neu*,.....*Ohio*,....., involving also the construction of this contract, a general demurrer was interposed and the Court states:

"The question raised is, whether or not this contract between Orebaugh and the Ford Motor Co. is against public policy, monopolistic in its tendencies, and in violation of the Sherman anti-trust law."

After a careful consideration of the provisions of the contract, the Court said:

"Having concluded this part of the questions that are made in this case and finding that the contract is a valid one, is not against public policy, is not monopolistic, and is not within the provisions of the Sherman anti-trust law, and that the patentee of these articles was discharging only his own legal rights protected by the patents, we now come to the question of liability of the defendant" * * *

In *Coleman v. Ford Motor Company*,.....
S. W....., in considering a previous contract of this company containing substantially the same provisions as the present contract, the right of plaintiff to govern the sale and distribution of its cars under the terms of the contract as well during the life, as after its termination, is fully sustained.

As has been said, plaintiff believes that it is for its best interest to vend direct to the ultimate consumer through the medium of agents rather

than sell outright to dealers who may vend to the ultimate consumer on such conditions as the dealer may select, depriving the consuming public of that uniformity of treatment, which, amongst other things, contributes so highly to the popularity of plaintiff's automobiles.

It is a matter of common knowledge that plaintiff's product has a very wide distribution, and sells readily in response to a wide public demand. To act as an intermediary in the distribution of such a product, and thereby earn commissions, is a representation which naturally would be eagerly sought for, and to secure it agents may well and profitably submit to onerous conditions that might not be worth while in connection with a less popular product. Such a motive is sufficient to account for the willingness of an agent to agree to the requirement of an 85 per cent advance. He could even profitably advance to the manufacturer the full retail list price and all carrying charges and yet be well compensated when his commissions were paid to him.

V.

THE RECORD CONTAINS ONLY THE CONTRACT.

Bearing in mind that there is no syllable in this record impugning the good faith of the Ford Motor

Company and its agents in making the contract under consideration, no valid reason exists why the contract should be interpreted otherwise than by the usual tests, or why it should not be construed in accordance with the usual and ordinary meaning of the language employed.

There is not even an ambiguity to which to attribute a doubt as to the intentions of the parties. To attribute to the parties some intention not to be found in the language employed is to disregard the contract actually made and clearly expressed, and attribute to the parties something not shown to have been even thought of, much less intended.

And why? The question can only be answered on the theory that, for some reason not disclosed by the record, the Court has arrived at the conclusion that the parties intended to violate the law, and hence by reasoning backward it is concluded that the parties did not intend those results which alone can follow from the language of their written contract, but something sinister, some evasion, some device to conceal the real transactions, and therefore that what the parties called a consignment was actually a sale.

Having thus travelled in a circle to find a premise the conclusion could easily be drawn that the Serman law was violated and that the attempt by the Ford Motor Company to fix the price at

which the automobiles made by it should be sold was beyond its right.

VI.

THE PRINCIPAL HAS THE RIGHT TO CONTROL ITS SALES AGENTS.

But a wide difference exists between the attempt by a patentee to project its control over prices to future sales after it has exercised the right to vend secured by the patent laws, and the power of a patentee to fix the prices at which its sales agents shall sell and to prescribe the territory within which the agent may act. This distinction is clearly apparent to the Court in the case of **Waltham Watch Co. v. Keene**, 202 Fed. 225, 240:

“In the case of *D. E. Virtue and Owatonna Fanning Mill Co. v. Creamery Package Mfg. Co. et al.*, 227 U. S. 8, 33 Sup. Ct. 202, 57 L. Ed. . . . , decided by the Supreme Court of the United States, January 20, 1913, the Owatonna Company was a manufacturer of churns and butter workers under various patents owned by it, and in April, 1897, it created the Creamery Package Manufacturing Company, its sales agent of them, the latter not manufacturing, which the Court held it had the right to do, and that in so doing it had the right to fix the prices at which its

sales agent should sell and the territory in which it should sell, and even the purpose for which it should sell.

“The Court said:

‘It is true they granted rights to the Creamery Package Manufacturing Company, and exclusive rights; but this was no violation of law. The owner of a patent has exclusive rights—rights of making, using, and selling. He may keep them or transfer them to another—keep some of them and transfer others. This is elementary; and, keeping it in mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we said in *Standard Sanitary Manufacturing Co. v. United States*, ante. But patents are not so used when the rights conferred upon them by law are only exercised.’

“The case just cited has nothing to do with restrictions, license agreements, or contracts attempting to fix the prices of such articles on re-sales when the sole right of vending has once been exercised by the sales agent. As stated, an exclusive sales agent of the manufacturer under a patent is but exer-

cising the sole right to vend expressly conferred by the patent statute."

Cole Motor Car Co. v. Hurst, 228 F. 280 (C. C. A.), was a case where, as in the case at bar, the lower court held contracts to be "sales" and hence in conflict with the anti-trust laws, and the Circuit Court of Appeals, on an analysis of the terms and conditions of the contract, reversed the case and held the contracts to be consignments and not in restraint of trade.

Hurst was designated as "distributor." He had to remit in full for all sales and the Company sent check weekly for commissions due. If a sale, Hurst would have held out his commission. The distributor was bound to insure in the name of Company. This presupposes an insurable interest and title in the Company. There were provisions for cancellation of the contract and return of unsold cars. No conditions were attached to the Company's right to take back machines whenever it chose to do so. The Company retained unqualified rights of dominion and control which were inconsistent with the theory that the transactions were sales.

Not only was the contract not contrary to anti-trust laws, but the Court said:

"On the contrary, its effect is to foster the trade of the Plaintiff Company, and to

enhance its business to make secure its returns. This sort of arrangement is not obnoxious to the law. (*Phillips v. Cement Co.* 125 F. 593.)

“It will be seen that it was not a contract which conveyed title to Hurst, and brought his control of the machines under the operation of the Texas law. Surely the Cole Company had the right to determine that its agents should sell its cars at its own prices.”

No amount of care or thought could devise a contract that would more clearly express an intention to create the relationship of principal and agent between the Ford Motor Company and its agents and provide for consignment of automobiles to such agents, retaining to the Ford Motor Company absolute control over the agents and their dealings as such representatives, than the contract now under review.

As was said in the last quotation:

“Surely the Cole Company had the right to determine that its agents should sell its cars at its own prices.”

And why should not the same rule and reason apply if we substitute for the words “Cole Company” the words “Ford Motor Company”?

We submit that language precisely applicable to the case at bar was used in the case of *Sturm v. Boker*, 150 U. S. 323, 37 L. ed. 1093-9:

“It is too clear for discussion, or the citation of authorities, that the contract was not a sale of the goods by the defendants to Sturm. The terms and conditions under which the goods were delivered to him import only a consignment. The words ‘consign’ and ‘consignment’ employed in the letters were used in their commercial sense, which meant that the property was committed or entrusted to Sturm for care or sale, and did not by any express or fair implication mean the sale by the one or purchase by the other.”

Again,

“The contract in its terms and conditions meets all the requirements of a bailment. The recognized distinction between bailment and sale is that when the identical article is to be returned in the same or in some altered form, the contract is one of bailment, and the title to the property is not changed. * * *

“The agency to sell and return the proceeds, or the specific goods if not sold, stands

upon precisely the same footing, and does not involve a change of title."

The case of *Harris v. Coe*, 71 Conn. 163, 41 Atl. 554, involved the construction of an oral contract concerning which evidence had been received in the trial court. The Supreme Court said:

"Was the contract in question one of sale or bailment? What the terms of the agreement entered into by the parties were, is a question of fact, upon which the decision of the trial court is final. What the legal effect of the provisions of the contract is, is a question of law, which may be reviewed on appeal."

And after reviewing the evidence and pointing out the good faith of the parties and concluding that the transactions showed a consignment for sale, the Court said:

"A consignment of goods for sale is ordinarily a bailment. The word 'consignment' does not imply a sale. The very term imports an agency, and that the title is in the consignor."

It will be seen that we are engaged in arguing in behalf of a contract which not only has every legal intendment in its favor, but is based upon

sound business judgment and experience, and is effective to produce proper and desirable results. Because the effect of such a contract generally applied to all the representatives of the plaintiff, and governing the distribution of its entire product of automobiles, is to enable the plaintiff to fix a uniform price at which all its automobiles shall be purchased by the ultimate consumer, does not create such a restraint of trade as to be violative of the Sherman law, and yet we can only explain the decision of the District Court in this case on the basis that the Court first assumed that any arrangement under which a uniform price to the consumer is fixed is violative of the Sherman law, and that a premise must be found from which to deduce that conclusion, and the assumption that the transaction was a sale and not a bailment afforded the necessary premise. But a uniform price is not wrong in itself nor is it conclusive that there is a violation of the Sherman Act.

VII.

RECENT LEGISLATION BY CONGRESS MATERIALLY AFFECTS THE RULES OF PUBLIC POLICY APPLICABLE TO PRICE MAINTENANCE CONTRACTS.

Congress, since the decision in the Miles case and the Sanatogen case, has made some most important pronouncements on the subject under discussion in

those cases—pronouncements having an important bearing upon the so-called “Public policy as to uniform prices.”

Section 2 of the Clayton Act (effective October 15, 1914) condemns discrimination in prices between customers on the same commodity as unlawful, when employed to substantially lessen competition or create a monopoly.

This is a most decided declaration of Congress upholding the virtue of uniform prices and condemning the practice of making different prices to different people for the same article.

Section 5 of the Federal Trade Commission Act (approved September 26, 1914) declares to be unlawful “unfair methods of competition.”

Thus we have at the same session of Congress two important declarations affecting the public policy of the United States on this subject—one upholding the policy of uniform prices and the other condemning certain forms of competition.

Time was when any and all forms of competition were regarded as highly virtuous and worthy of encouragement by the Court.

But these declarations point out clearly that the thing to be condemned is monopoly, whether produced by competition or combination.

Fundamentally this is the true and only inquiry: Do the acts in question tend substantially to bring monopoly? What then is monopoly? What constitutes such a monopoly as to be subject to condemnation by the courts? Do the acts under investigation tend substantially to bring about such a monopoly?

We submit no public good demands competition in a single article of manufacture of a single maker, where there are large numbers of manufacturers in the same line, and when there is abundant active competition in that line.

If uniformity of prices on the same article is desirable, then any system of a manufacturer designed to bring about such uniformity to the public should be favorably construed to effectuate such object, and should never be condemned unless plainly in itself illegal, that is mala in se.

A CONTRACT PRESUMED TO BE LAWFUL UNLESS THE FACTS CLEARLY INDICATE OTHERWISE.

In thus reasoning, the Court overlooked well settled cardinal principles essential to the proper construction of contracts. It is our contention that the contract under consideration contemplated a normal, a proper, and customary relation between

principal and agent, and we submit to the Court that:

“A contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.”

Cincinnati P. B. S. & P. Packet Co. v. Bay,
200 U. S. 184, 50 L. ed. 432.

Hobbs v. McLean, 117 U. S. 567, 29 L. ed. 940.

“But if the articles of partnership were fairly open to two constructions, the presumption is that they were made in subordination to and not in violation of Section 3737; and if they can be construed consistently with the prohibitions of the section they should be so construed. For it is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted.”

VIII.

FACTS OF THE CASE LIMITED TO THE CONTRACT ITSELF.

There are no “established facts” in this case,

except the complaint, and the contract itself, and the motion to dismiss, admitting the truth of the allegations of the complaint.

In *Bigelow v. Calumet & Hecla Mining Co.*, 167 Fed., at page 728, the Circuit Court of Appeals said:

“But when the agreement or combination in question does not in its terms provide for the suppression of competition or the creation of a monopoly, nor bring about such a result as a necessary legal consequence, but requires further acts or conduct to bring about such an unlawful result, some evidence of an unlawful intent becomes essential, that the court may see that, if not stopped, a prohibited restraint is likely to be created.”

And further:

“The burden of showing acts and circumstances which establish the fact that an unlawful result is contemplated and will ensue, unless checked, is upon those asserting the illegality of the contract assailed.

“In *Cincinnati P. B. S. & P. Packet Co. v. Bay*, 200 U. S. 179-184, 50 L. ed. 428, it is cogently said, in respect to the question as to whether a particular combination or agreement will operate to produce an unlawful re-

sult under the anti-trust law, that 'a contract is not to be assumed to contemplate unlawful results unless a fair construction requires it upon the established facts.'"

The contract between plaintiff and its agent is clear and definite in language and precise in its use of terms, and no word can be found therein which even squints at a sale.

In fact the entire argument on which is based the conclusion that the legal effect of the contract is a sale to the agent begins and ends with Condition 10 of the contract (Transcript, p. 21) which provides that the agent shall advance to the company 85 per cent of the list price of the automobiles to be consigned to him and receive 15 per cent as his commission. The inconclusiveness of this reasoning to contradict the plain language of the contract or to impeach the good faith of the parties is apparent. It is a case of basing an inference on an inference and drawing thence a conclusion, a form of argument not to be tolerated in legal proceedings.

We find pertinent in this connection another quotation from **Hobbs v. McLean**, from which we have just quoted:

"This is the plainly expressed meaning of the partnership contract, and it is only by a strained and forced construction that it can

be held to effect a transfer of Peck's contract with the United States and to be a violation of the statute."

The relation of the Ford Motor Company and its agent is that of bailor and bailee for mutual benefit, the subject of the bailment being the consignment of automobiles, and the object the employment to negotiate for sales by the bailor of its property. The relation might well be termed that of principal and factor—a relation long regarded as beneficial in the transaction of business, and one whose legal effect has been defined by numerous decisions. The property consigned is bailed and remains in the ownership of the consignor until disposed of by the consignee in pursuance of the agency established by the fact of consignment.

The Ford Motor Company and its agents have the right to select the conditions under which they will contract, no matter how onerous those conditions may seem to others.

IX.

IF THE AGENCY CONTRACT BE IGNORED AND A SALE CONTRACT BE CONSTRUCTED BY THE COURT, IT WAS AT LEAST A SALE SUBJECT TO CONDITIONS.

SALES SUBJECT TO CONDITIONS ARE VALID.

We have thus far discussed the contract as it reads, and as the parties made it, and as we contend it should be considered, there being nothing in the record on which to impeach its good faith or question its terms as expressing the actual relationship between the parties.

The District Court not only held the transaction to be a sale, but further held that the Sherman Act was violated and that, therefore, the plaintiff was not entitled to the relief prayed for, or any relief.

It is our position that the contract in question is what it purports to be, an agency and consignment contract, and that the Sherman Act has no application to the the transactions disclosed by the record in this case, but we are prepared to go further and contend that even though it be conceded for the purpose of argument that the contract is capable of being interpreted as provided for sales whereby the agent acquired the full and complete ownership of the automobiles consigned to him, yet, that nevertheless the Sherman law was not violated. Unless the court is prepared to eliminate the contract in its entirety and itself construct for the parties a new contract out of the tenth condition of the actual contract, the transaction was at least a sale subject to

conditions which must be complied with by the purchaser and which can be enforced against him.

X.

THE CONTRACT CONCERNED A PATENT PRODUCT.

It appears from the record that Ford automobiles are manufactured under numerous Letters Patent of the United States and these patents are enumerated in the contract which is made a part of the complaint. (Transcript—pages 4 and 27.)

As a preliminary it may be well to remind ourselves that a patentee is granted by the law broad and exclusive rights. He may make, sell, or use, or not as he will. He may grant to others these rights or any of them, or any part of them, and impose conditions on the exercise of the rights granted.

All discussion of this proposition has led to but one conclusion, as stated in **Paper Bag Patent Case** 210 U. S. 424, 52 L. ed. 1122.

“It shows that, whenever this court has had occasion to speak, it has decided that an inventor receives from a patent the right to exclude others from its use for the time prescribed in the statute. ‘And, for his exclusive enjoyment of it during that time, the public

faith is pledged.' Chief Justice Marshall in Grant v. Raymond, 6 Pet. 242-3."

And again in **Bement & Sons vs. National Harrow Company**, 186 U. S. 70, 46, L. ed. 1059, the Supreme Coure said:

* * * * *

"Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal."

The right of the patentee to sell the patented article **subject to conditions prescribed by contract between the patentee and the vendee** has been recognized by numerous decisions of the Supreme Court, and restrictions thus created are within the rights secured to the patentee by the patent laws and not obnoxious to the Sherman law.

In the case of **Keeler v. Standard Folding Bed Co.**, 157 U. S. 657, 39 L. ed. 848, the Court said:

“When the patentee has not parted, by assignment, with any of his original rights, but chooses himself to make and vend a patented article of manufacture, it is obvious that a purchaser can use the article in any part of the United States, and, **unless restrained by contract** with the patentee, can sell and dispose of the same.”

After discussing several prior decisions as to the rights of patentee the Court further said:

“The scope and effect of those decisions were thus expressed by Mr. Justice Clifford, in **Mitchell v. Hawley**, 83 U. S., 16 Wall. 547 (21 L. ed. 323.):

Patentees acquire by their letters patent the exclusive right to make and use their patented invention and to vend to others to be used for the period of time specified in the patent, but when they have made one or more of the things patented, and have vended the same to others to be used, they have parted to that extent with their exclusive right, as they are never entitled to but one royalty for a patented machine, and consequently a patentee when he has himself constructed a

machine and sold it **without any conditions**,
 and the consid-
 eration has been paid to him . . . must
 be understood to have parted to that extent
 with all his exclusive right.’ ”

In the preceding and following quotations the black face letters are ours and call attention to the recognition by the courts of the distinction we make that it is only a sale **without condition or restriction** that passes the patented article out from under the monopoly which the law secures to the patentee.

In the Dick case, (224 U. S. 1) the Court said:

“By sale of a patented article **subject to no conditions**, the purchaser undeniably acquires the right to use the article for all the purposes of the patent, so long as it endures. He may use it where, when, and how he pleases, and may dispose of the same unlimited right to another. This has long been the settled doctrine of this and all patent courts. . . . By such an **unconditional** sale of the thing patented it is said to be ‘no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of Congress.’

In the cases cited above, as well as in the leading case of **Bloomer v. McQuewan**,

14 How. 539, the statement that a purchaser of a patented machine has an unlimited right to use it for all the purposes of the invention, so long as the identity of the machine is preserved, was made of one who bought **unconditionally**; that is, **subject to no specified limitation** upon his right of use."

And further:

"An **absolute and unconditional** sale operates to pass the patented thing outside the boundaries of the patent, The rule and its reason is thus stated in **Robinson on Patents, Vol. 2, §824**:

"The sale must furthermore be unconditional. Not only may the patentee impose **conditions limiting** the use of the patented article, upon his grantees and express licensees, but any person having the right to sell may, at the time of sale, **restrict** the use of his vendee within specific boundaries of time or place or method, and these will then become the measure of the implied license arising from the sale.' "

Further:

"We repeat. The property right to a patented machine may pass to a purchaser with

no right of use, or with only the right to use in a specified way, or at a specified place, or for a specified purpose. The unlimited right of exclusive use which is possessed by and guaranteed to the patentee will be granted if the sale be unconditional."

And in the same case the Court said:

"Where, then, is the line between a lawful and an unlawful qualification upon the use? This is a question of statutory construction. But with what eye shall we read a meaning into it? It is a statute creating and protecting a monopoly. It is a true monopoly, one having its origin in the ultimate authority, the Constitution. Shall we deal with the statute creating and guaranteeing the exclusive right which is granted to the inventor with the narrow scrutiny proper when a statutory right is asserted to uphold a claim which is lacking in those moral elements which appeal to the normal man? Or shall we approach it as a monopoly granted to subserve a broad public policy, by which large ends are to be attained, and therefore to be construed so as to give effect to a wise and beneficial purpose? That we must neither transcend the statute, nor cut down its clear meaning, is plain. In **E. Bement & Sons v. National Har-**

row Co. 186 U. S. 70, 89-92, 46 L. ed. 1058, 1068, 1069, 22 Sup. Ct. Rep. 747, this court quoted with approval the language of Chief Justice Marshall in *Grant v. Raymond*, 6 Pet. 218, 241, 8 L. ed. 376, 384. Concerning the favorable view which the law takes as to the protection extended to the exclusive right, the court, through Chief Justice Marshall, said:

“It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and it is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made; and to execute the contract fairly on the part of the United States, where the full benefit has been actually received, if this can be done without transcending the intention of the statute, or countenancing acts which are fraudulent or may prove mischievous. The public yields nothing which it has not agreed to yield, it receives all which it has contracted to receive. The full benefit of the discovery, after its enjoyment by the discoverer for fourteen years, is preserved; and for his exclusive enjoyment of it during that time the public faith is pledged.’”

And further, in discussing the prior case of **E. Bement & Sons** against **National Harrow Company**, 186 U. S. 70, the Court said:

"In **E. Bement & Sons** there was involved the legality of certain contracts between patentees of and dealers in patented harrows. The purpose and effect of the combination and of the contracts between the parties was to fix and keep up the prices at which licensees might sell the patented harrows. It was claimed that the combinations and contracts were obnoxious to the Sherman Act; but, upon the other side it was said that as the contract concerned only the sale of patented articles, that the act did not apply. The character of the monopoly granted under the patent act was therefore involved. Touching the right of the patentee to exclude all others from the use of his invention, the court quoted with approval what was said in the **Button Fastener Case**, 77 Fed. 288, as follows:

" 'If he sees fit, he may reserve to himself the exclusive use of his invention or discovery. If he will neither use his device nor permit other to use it, he has but surpressed his own.' "

* * * * *

"In that case the question was not one of

infringement, but one arising in a suit to enforce certain contracts directly restraining commerce in patented articles which were claimed to violate the Sherman Law, although the agreement covered only patented articles. The Court, after referring to the exceptions to the patentee's monopoly resulting from conflict with the police power of the state, said:

“ ‘Notwithstanding these exceptions, the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.’ ”

“Now if this was a suit to recover damages upon the contract not to use the machine except in connection with other articles proper in its use, made by the patentee, the only possible defense would be that the agreement was one contrary to public policy, in that it affected freedom in the sale of such articles

to the user of such machines. But that was the nature of the defense made to the suit to enforce the agreements under consideration in the Bement Case. The court in that case found that the contracts did include interstate commerce within their provisions and restrained interstate trade, but with reference to the Sherman Act (26 Stat. at L. 209, chap. 647, U. S. Com. Stat. 1901, p. 3200) said:

“‘But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the act, we have no doubt, was never contemplated by its framers.’

“As to whether the restrictions upon sales imposed by the agreements were ‘legal and reasonable conditions’, the court said:

“‘The provision in regard to the price at which the licensor would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold but that was only rec-

ognizing the nature of the property dealt in, and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article.'

"If the stipulation in an agreement between patentees and dealers in patented articles, which, among other things, fixed a price below which the patented articles should not be sold, would be a reasonable and valid condition, it must follow that any reasonable stipulation, not inherently violative of some substantive law, imposed by a patentee as part of a sale of a patented machine, would be equally valid and enforceable.

* * * * *

"The provision in regard to the price at which the licensor would sell the article manufactured under license was also an appropriate and reasonable condition. It tended to keep up the price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in, and pro-

viding for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it or sell the right to manufacture and sell the article patented upon the condition that the assignee shall charge a certain amount for such article."

In the Bement Case it is held that a license to make and sell can be burdened with restrictions on the price at which the licensee can sell.

After such licensee has paid the cost of manufacture and the royalty to the patentee it is impossible to distinguish his position and title as to the product from that of one who has acquired the patented article from the patentee by paying a price which includes the same elements and is substantially the same as that paid by a licensee, that is to say, the cost of manufacture and a compensation to the patentee based on his ownership of the patent.

And, as was said in the Bement Case,

"The plaintiff, according to the finding of the referee, was at the time when these licenses were executed the absolute owner of the letters patent relating to the float spring tooth harrow business. It was therefore the

owner of a monopoly recognized by the Constitution and by the statutes of Congress. An owner of a patent has the right to sell it or to keep it; to manufacture the article himself or to license others to manufacture it; to sell such article himself or to authorize others to sell it."

That we have stated the correct rule is borne out by the interpretation put on the Sanatogen and Bobbs Merrill decisions in some recent cases.

In *American Graphophone Co. v. Boston Store*, 225 Fed. 785, the Court in quoting from those decisions pointed out that in those cases there was no question of **contract** but only of attempt to fix prices by **printed notices**, and concluded:

"That an agent or vendee of a patentee may, by **direct covenant or agreement**, be bound to the observance of price restriction, imposed as a condition upon which exclusive right of sale by the patentee is being exercised."

And in discussing the Bement Case, which settles the rights to impose price restriction on a licensee to make and sell, the Court said:

"The covenant for price restriction in the Bement and other cases referred to, although

found in a license to manufacture and sell, was germane to the patentee's exclusive right of sale. . . . It is impossible, in my judgment, to draw a tenable distinction between those cases and the case of a direct sale by the patentee of his patented article."

The opinion of the Circuit Court of Appeals, Seventh Circuit, in the case of **Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.**, 154 Fed. 359, is full and convincing.

In that case the arrangement by which the patentee sought to maintain prices, was attacked as in violation of the Sherman Act.

The Court, in the course of its opinion, said:

"Under its constitutional right to regulate interstate commerce Congress made illegal 'every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states,' and subjected to liability to fine or imprisonment 'every person who shall monopolize, or attempt to monopolize, or combine, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states.' Congress, having created the patent law, had the

right to repeal or modify it, in whole or in part, directly or by necessary implication. The Sherman law contains no reference to the patent law. Each was passed under a separate and distinct constitutional grant of power; each was passed professedly to advantage the public; the necessary implication is not that one iota was taken away from the patent law; the necessary implication is that patented articles, unless or until they are released by the owner of the patent from the dominion of his monopoly, are not articles of trade or commerce among the several states. The evils to be remedied by the Sherman law are well understood. Articles in which the people are entitled to freedom of trade were being taken as the subject of monopoly; instrumentalities of commerce between which the people are entitled to free competition were being combined. The means of effecting and the form of the combination are immaterial; the result is the criterion. The true test of violation of the Sherman law is whether the people are injured, whether they are deprived of something to which they have a right. **Northern Securities Co. v. United States**, 193 U. S. 197, 24 Sup. Ct. 436, 48 L. ed. 679.

"The only grant to the patentee was the right to exclude others, to have and to hold for himself and his assigns a monopoly, not a right limited or conditioned according to the sentiment of judges, but an absolute monopoly constitutionally conferred by the sovereign lawmakers. Over and above an absolute monopoly created by law, how can there be a further and an unlawful monopoly in the same thing? If plaintiff were the sole maker of Grant tires, how could plaintiff's control of prices and output injure the people, deprive them of something to which they have a right? Is a greater injury or deprivation inflicted, if plaintiff authorizes a combination or pool to do what plaintiff can do directly? To say yes means that substance is disregarded, that mere words confer upon the people some sort of a right or interest counter to the monopoly, when by the terms of the bargain the people agreed to claim none until Grant's deed to them shall have matured.

* * * * *

"None of the provisions of the contract, in our judgment, touched any matter outside of the monopoly under the patent. The control of prices and output, for reasons already stated, did not deprive the public of any right."

XI.

A PRINCIPAL MAY LAWFULLY CONTROL ITS
AGENTS. COMPETITION NOT AFFECTED
THEREBY.

It should be borne in mind that the case at bar is not one where rival manufacturers of competing products seek to eliminate competition in the sale of their products, but concerns only the marketing of one independent product actively competing with scores of other automobiles of equal or greater attractiveness. The distinction is pointed out in the case of **Blount Manufacturing Co. v. Yale & Towne Manufacturing Co.** 166 Fed. 555, where owners of competing patents entered into an agreement for the elimination of competition and the pooling of profits. The Court said of that:

“A contract whereby the manufacturers of two independent patented inventions agree not to compete in the same commercial field deprives the public of the benefit of competition, and creates a restraint of trade.”

But, the Court also uses language which seems to us to cover all that plaintiff could be charged with having done in its attempt to regulate the prices at which its product should be sold:

“It seems self-evident that a contract

which is only coextensive with the monopoly conferred by letters patent, and which creates no additional restraint of trade or monopoly, does not conflict with the Sherman Act. The monopoly granted by letters patent is of a particular invention. Devices thus protected by patents are as a matter of fact in commercial competition with both patented and unpatented devices."

Assuming that the contract in the case at bar was a contract whereby the patentee sought to regulate the prices at which the patented article should be sold, we contend that such a contract is only co-extensive with the monopoly to which the patentee is by law entitled. The contract does not restrain trade beyond the life of the patent, or create any additional restraint of trade beyond the privilege which the patentee unquestionably has to vend the patented article or refrain therefrom and refuse to the public the use of it.

As was said by the Supreme Court in *Virtue v. Creamery Package Mfg. Co.* 227 U. S. 32, 57 L. ed. 393, 404:

"The owner of a patent has exclusive rights,—rights of making, using, and selling. He may keep them or transfer them to another,—keep some of them and transfer others. This is elementary; and, keeping it in

mind, there is no trouble in estimating the character of such rights or their transfer. Of course, patents and patent rights cannot be made a cover for a violation of law, as we stated in **Standard Sanitary Mfg. Co. v. U. S.** 266 U. S. 20, 57 L. ed. 107. But patents are not so used when the rights conferred upon them by law are only exercised. The agreement of the 19th of April, 1897, constituted, as we said, the Creamery P. M. Co. a sales agent of the churns and butter workers and fixed their list price."

And after further discussing the contracts alleged to be in restraint of trade, the Court said:

"The Owatonna Company **did nothing more in its contract with the Creamery Package Mfg. Co. than to make that Company its exclusive sales agent, and this was no violation of law.** But, be that as it may, we repeat, patent rights may be conveyed partially or entirely, and the monopoly of use, of manufacture, or of sale, is not one condemned by law."

In the Dick Case the Court further used this pertinent language:

"The market for the sale of such articles to the users of his machine, which, by such

a condition, he takes to himself, was a market which he alone created by the making and selling of a new invention. Had he kept his invention to himself, no ink could have been sold by others for use upon machines embodying that invention. By selling it subject to the restriction, he took nothing from others, and in no wise restricted their legitimate market."

Suppose the Ford Company had itself rented stores or garages in each of the towns where it desired to have its automobiles sold and put in charge there of its employes, and secured by borrowing from local banks the money it might need, pledging as security therefor the automobiles shipped to the local garage, certainly no question would or could be raised as to its right to instruct those employes as to their duties, including the prices at which they could sell automobiles. Here certainly would be no restraint of trade.

And the situation is legally in no way different where the Ford Motor Company selects and appoints a local man as an agent and consigns automobiles to him to find buyers therefor to whom it can sell, and requires that agent to maintain a garage and shop for giving service to Ford owners and receives from that agent by way of advances against consignments of automobiles such sums of money as may be agreed upon.

Such an agent is no less under the direction and control of the Ford Motor Company than an employee sent out from the factory. The principal is certainly not prohibited by any rule of law from dictating the prices at which its automobiles shall be sold by its agents, nor is the situation altered by the fact that there are hundreds of similar agents all governed by identical contracts.

By the contract shown in this record the relationship created is that of principal and agent and if the contract is interpreted by the usual canons of interpretation, no other meaning can be found in it.

Nothing in this record justifies the suspicion of an attempt to evade any law. The fact that the Ford Motor Company is a very large concern, that its production of automobiles is enormous, that its agents are very many, surely is not yet a violation of law.

“There is no limit in this country to the extent to which a business may grow.”

**United States v. Eastman Kodak Co. 226 Fed.
80.**

**United States v. International Harvester Co.
214 Fed. 1000.**

We respectfully submit that the conclusion of the District Court that the Sherman law is violated by the contract under consideration can only be explained by the mere bigness of the transactions involved. Having arrived at the conclusion that the Sherman law was violated, a premise could be found for that conclusion only by holding that there was no agency or consignment but rather a sale by the pretended principal to the alleged agent and hence a mere device to evade the Sherman law.

It would have been interesting if we had been given the process by which the Court thus reasoned in a circle.

XII.

RESTRICTED OR CONDITIONAL SALES.

But the premise is not sufficient to support the conclusion.

The agent, if he be held a buyer, did not buy for use but only for resale, and the transaction was a sale subject to restrictions, not an unconditional sale, and no appellate court has yet denied the patentee the right **by contract** to impose conditions on the disposition that a purchaser for resale and not for his own use may make of the patented article. The right to refuse to sell at all is beyond question, and that right includes the right to make any kind

of a partial or restricted sale that may be agreed on.

The market for Ford automobiles was one created by the Ford Motor Company and as the Supreme Court said in the Dick Case in the last quotation just made:

“was a market which he alone created by the making and selling of a new invention.”

And again:

“By selling it subject to the restriction, he took nothing from others and in no wise restricted their legitimate market.”

And in further discussing this right of a patentee to sell or refuse to sell, the Court further said in the Dick case:

“This was pointed out in the Paper Bag Case, where the inventor would neither use himself nor allow others to use, and yet was held entitled to restrain infringement, because he had the exclusive right to keep all others from using during the life of the patent. This larger right embraces the lesser of permitting others to use upon such terms as the patentee chooses to prescribe. It must not be forgotten that we are dealing with a constitutional and statutory monopoly. An attack upon the rights under a patent be-

cause it secures a monopoly to make, to sell, and to use, is an attack upon the whole patent system. We are not at liberty to say that the Constitution has unwisely provided for granting a monopolistic right to inventors, or that Congress has unwisely failed to impose limitations upon the inventor's exclusive right of use. And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries required to be restrained, Congress alone has the power to determine what restraints shall be imposed. As the law now stands, it contains none, and the duty which rests upon this and upon every other court is to expound the law as it is written. Arguments based upon suggestions of public policy not recognized in the patent laws are not relevant. The field to which we are invited by such arguments is legislative, not judicial. The decisions of this court, as we have construed them, do not so limit the privilege of the patentee, and we could not so restrict a patent grant without overruling the long line of judicial decisions from circuit courts and circuit courts of appeal, heretofore cited, thus inflicting disastrous results upon individuals who have made large investments in reliance upon them.

"The conclusion we reach is that there is

no difference, in principle, between a sale subject to specific restrictions as to the time, place, or purpose of use, and restrictions requiring a use only with other things necessary to the use of the patented article purchased from the patentee.

* * * * *

“Some of them concern sales subject to a restriction upon the price upon resale, and others relate to a requirement that the article sold shall be used only in connection with certain other things to be bought from the patentee. We deem it well, however, to refer to the opinion of the Circuit Court of Appeals of the Eighth Circuit, delivered by Judge (now Mr. Justice) Van Devanter in *National Phonograph Co. v. Schlegel*, cited above, because it draws so clearly the distinction between a conditional and an unconditional sale of a patented article. Speaking for the court, Judge Van Devanter said:

‘An unconditional or unrestricted sale by the patentee, or by a licensee authorized to make such sale, of an article embodying the patented invention or discovery, passes the article without the limits of the monopoly, and authorizes the buyer to use or sell it without restriction; but to the extent that the

sale is subject to any restriction upon the use or future sale, the article has not been released from the monopoly, but is within its limits, and, as against all who have notice of the restriction, is subject to the control of whoever retains the monopoly. This results from the fact that the monopoly is a substantial property right conferred by law as an inducement or stimulus to useful invention and discovery, and that it rests with the owner to say what part of this property he will reserve to himself and what part he will transfer to others, and upon what terms he will make the transfer.' ”

National Phonograph Co. v. Schlegel, 128 F. 733, from the opinion in which the Supreme Court took the quotation above repeated, and gave to it the stamp of its approval, was a case where a contract was entered into binding a purchaser not to resell for less than certain named prices, or to any other dealer who did not sign a contract, and **it was held that such contract was valid and enforceable** in a suit to restrain future violations of the contract.

The Ford Motor Company is given by law a monopoly under its patent enumerated in the contract in question. It is entitled to refrain from making, or vending, or using the patented article, and it is entitled to prescribe the con-

ditions under which it will permit others to make, sell or use, and no steps which it may take to protect those rights can be obnoxious to the Sherman law.

Granted that it is true as was said by the District Court in the case at bar:

“Now, this contract is adroitly drawn, no question about that, and it attempts to control, not only the price at which agents or sub-agents of the company shall sell automobiles, but the persons to whom they shall sell them, and the territory in which they shall be sold.”

We submit that the entire pith of this statement lies in its use of the word “adroitly.”

But even if we assume, again without warrant of any proof or allegation in this record, that there was an attempt on the part of the Ford Motor Company to be “adroit,” yet it is sufficient comment on the result to quote again from the Dick Case:

“And if it be that the ingenuity of patentees in devising ways in which to reap the benefit of their discoveries requires to be restrained, Congress alone has the power to determine what restraints shall be imposed. As the law now stands it contains none, and the

duty which rests upon this and upon every other court is to expound the law as it is written. Arguments based upon suggestions of public policy not recognized in the patent laws are not relevant. The field to which we are invited by such arguments is legislative, not judicial."

XIII.

DISTINCTION BETWEEN RIGHT TO CONTROL SALES AND PRICES BY CONTRACT AND ATTEMPT TO DO SO BY NOTICE.

We pass now to the distinction apparent in the leading cases between what may be done by a contract between parties in privity and what cannot be done by attaching a notice to an article sold. This distinction is apparent in many of the cases we have hereinbefore discussed and we have been at some pains to call attention to it.

THE SANATOGEN AND MILES MEDICAL COMPANY CASES DISTINGUISHED.

Of the two cases cited, in the opinion of the District Court, one,—the case of **Dr. Miles Medical Company v. John D. Park & Sons**, 220 U. S. 373,—did not involve patented articles, or rights under the patent law. The other case,—**Bauer v. O'Donnell**, 229 U. S. 1-10, 57 L. ed. 1041-3,—contains no mention

of the Sherman Act and was a suit to restrain the alleged infringement of a patent by a retail dealer in selling at a price less than that marked on the package.

In the Miles Medical Company Case the articles sold were made under a secret process but not protected by any letters patent. In that case the Court said in this connection:

“First. The first inquiry is whether there is any distinction, with respect to such restrictions as are here presented, between the case of an article manufactured by the owner of a secret process and that of one produced under ordinary conditions. The complainant urges an analogy to right secured by letters patent. *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747. In the case cited, there were licenses for the manufacture and sale of articles covered by letters patent, with stipulations as to the prices at which the licensees should sell. The court said, referring to the act of July 2, 1890 (p. 92): ‘But that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the

terms upon which the article may be used and the **price to be demanded therefor.** Such a construction of the act we have no doubt was never contemplated by its framers.'

"But whatever rights the patentee may enjoy are derived from statutory grant under the authority conferred by the Constitution.

* * * * *

"The complainant has no statutory grant. So far as appears, there are no letters patent relating to the remedies in question. The complainant has not seen fit to make the disclosure required by the statute and thus to secure the privileges it confers. Its case lies outside the policies of the patent law, and **the extent of the right which that law secures is not here involved or determined.**"

(Black-face type ours.)

Packages of "Sanatogen" were marked with a notice that they were not to be sold by retailers at less than \$1.00 per, and infringement of the patent was charged against a retailer who sold for less.

All that was decided was that there had been no infringement, and that Sherman law was not involved.

The Court in the course of its decision said:

“The patentee relies **solely** upon the notice quoted to control future prices in the resale by a purchaser of an article said to be of great utility and highly desirable for general use. The appellee and the jobbers from whom he purchased were **neither the agents nor the licensees of the patentee.**”

(Black-face type ours.)

It was held that the holder of the patent could not thus control the price. Where purchase was made from one who had full title and right of disposition it passed free from price restriction.

There was no question there, as in our case, of violation of contract, or of the relation of principal and agent.

It will be noted by the quotation that the Court carefully discriminates from a situation where the vendor is **an agent** of the patentee imposing the price restriction, and hence the case not only is not an authority for the respondents, but inferentially supports our contention that a patentee can, by proper contract, make a sale on condition, or create an agency for future sale, and retain the right to fix the price at which the user may buy, and bring the patentee and buyer into immediate relationship of vendor and vendee through an agent selected by the vendor.

There was no question in the "Sanatogen" Case of the violation by the retailer of a direct contract with the holder of the patent and the case did not decide that the holder of the patent could not **contract** directly with the retailer as to the price at which the patented article should be sold to a user.

That case did not hold it illegal to attempt to fix the re-sale prices of the patented articles—but only that the attempt in that instance was not successful because it was a **mere notice**, not binding on strangers under the circumstances.

That case did not pretend to overrule numerous prior cases holding that it is entirely competent and proper to establish a monopoly in a patented article. It only said that it could not be done by a notice.

That case did not attempt to revolutionize and overturn the law giving the patentee the exclusive right to vend the article. It merely said that in that case he had exhausted his right to vend when he sold at his full price, and that a mere notice did not qualify or restrict the title thus sold.

Note the important distinction. In the Dr. Miles Case the Court held it was illegal and unlawful to attempt to control re-sale prices of patented articles becausee contrary to the anti-monopoly laws.

But in the Sanatogen Case the Court did not hold that it was illegal or unlawful to control re-sale prices of patented articles, but only that the particular plan was not effective. .

It has always been lawful to monopolize a patented article. "Its very nature is that of a monopoly" says the Bement Case.

The Sanatogen Case was a suit against sub-vendees to compel them to obey a notice, which notice was in distinct opposition to the title vended. This is a case to compel respect for signed contracts, contracts absolutely lawful in themselves.

OTHER CASES DISTINGUISHED.

Standard Sanitary Mfg. Co. v. U. S. 226 U. S. 20-49, 57 L. ed. 107.

Was a suit by the Government to enjoin violation of the Sherman Act. There was a combination of a large number of manufacturers and several patents and a combination to control trade contrary to the Sherman law.

The fact that patent rights were held by some or all of the defendants was held not enough to enable the defendants to escape the law.

Even where the question of patent monopoly is involved, however, a system of uniform trade agreements based upon the use of a patented invention which transcends what is necessary to protect such monopoly, and which practically controls the output and dictates the prices from producer to consumer on nearly **all sales of sanitary enameled iron-ware** throughout the country as illegal and void. This was an attempt under cover of patent rights to control trade on articles **not covered by any patents**.

In *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 52 L. ed. 1086, suit was brought to restrain the sale of a copyrighted book at retail at less than \$1.00 for each copy, basing it on a printed notice in the book.

As the Court said:

“The facts disclose a sale of a book at wholesale by the owners of the copyright, at a satisfactory price, and this **without agreement** between the parties to such sale obligating the purchaser to control future sales, and where the alleged right springs from the copyright law alone. * * . * *

“In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who **made no agreement** as to the control of

future sales of the book, and took upon themselves no **obligation to enforce the notice** printed in the book. * * * * *

“In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, by notice, such as is disclosed in this case, a limitation at which the book shall be sold at retail by future purchasers, **with whom there is no privity of contract.**”

(Black-face type ours.)

The decision in the Bobbs-Merrill Case, as well as in the Sanatogen Case, was grounded solely upon the principle that the owner of a patent or copyright cannot qualify the title passed by means of a **mere notice attached to the chattel**, so as to restrict third persons in the sale of such articles.

In the case of **Straus v. American Publishing Company** (231 U. S. 222, 58 L. ed. 192) there was a combination of seventy-five (75%) per cent of the publishers and a majority of the booksellers in the United States united in an agreement not to sell copyrighted books originally uncopyrighted as well to dealers who would not maintain prices and it was held that where a copyrighted book had been sold and passed out from under the monopoly per-

mitted by law, the price could not be kept up by **printed notices of retail price attached to the book.**

In the case of **Victor Talking Machine Co. v. Strauss**, 230 Fed. 449, the Circuit Court of Appeals followed the Dick, rather than the Bobbs-Merrill and Sanatogen cases, and held that the plaintiff was entitled to the relief prayed for by its bill, and could maintain prices by a notice attached to the machine. This case has recently been reversed by the Supreme Court of the United States in an opinion not yet printed, and which at this time it is not possible to discuss, but it is to be assumed from the way in which the Supreme Court has regarded these questions in the Sanatogen, Bobbs-Merrill and other recent cases that the reversal was based upon the distinction, which we are urging in this case, between rights protected by direct contract and the attempt to restrict the ultimate purchaser by a **mere notice attached to the machine.**

In the case at bar, we are not attempting to claim anything by reason of any notice, but only to maintain the integrity of a contract as between the parties thereto.

We think we have quoted enough of the language of the courts to make plain our proposition that a patented article does not pass out from under the monopoly unless a sale or transfer has been **unconditional and unrestricted**, and by no possible

manner of interpretation can there be any escape from the numerous conditions under which the Ford Motor Company consigned automobiles to its agents.

We may then sum up this branch of the argument by saying, **FIRST**, that under the contract, whether construed as an agency contract or sale, the automobiles had not passed out from under the monopoly of the patentee; and **SECOND**, that, while it could be conceded that parties competent to contract may make any contract which they see fit, no Appellate Court has yet held that the Sherman Act was violated by a **contract** between the patentee and his vendee restricting the price at which the patented article may be sold, or the conditions under which it may be used, or the territory within which it may be sold.

In the Sanatogen Case, which related to a patented article, it was held that the holder of the patent could not project his control forward to a subsequent purchaser by **notice** printed on the package, but there was not in that case any question of the violation of a **contract** or of the prohibition of the Sherman law.

In the **Miles Medical Company** Case the Court used this language:

“Nor can the manufacturer by **rule and**

notice in the absence of contract or statutory right, even though the restriction be known to purchaser, fix prices for future sales."

"Whatever right the manufacturer may have to project his control beyond his own sales must depend not upon an inherent power incident to production and original ownership, **but upon agreement.**"

The black-face in the quotations just made are ours, for the purpose of calling attention to the fact that the Court evidently recognized that **by contract** the patentee can project his control beyond his own sales.

This distinction has been recognized in cases of which *United States v. Kellogg Toasted Corn Flake Co.* 222 Fed. 725-731 is an example. There the Court called attention to the fact that *Bobbs-Merrill Co. v. Straus* and *Bauer v. O'Donnell* were infringement suits—the one under a copyright, and the other under a patent, and to that part of the decision in the *Bobbs-Merrill Case* where it was said that

"There is no claim in this case of **contract** limitation, nor license **agreement** controlling the subsequent sale of the book."

In *United States v. Keystone Watch Case Co.* 218 Fed. 502-514 the Court said:

“The defendant company attempted to restrict the prices at which the wholesaler or jobber might sell to the retailer, and to this end made a **direct agreement** with the jobber. As we understand the decisions, such an agreement was within the company’s lawful rights. Certain material parts of the Howard watch were covered by bona fide patents taken out and used for a lawful purpose and as the owner of these patents the company **had the right to make a direct agreement** with the jobbers whereby a minimum price was fixed at which the jobber might sell.”

XIV.

THE DECISIONS OF THE COURTS IN FRANCE, BELGIUM AND GERMANY ON THIS IDENTICAL QUESTION RECOGNIZE THE DIFFERENCE BETWEEN A CONTRACT REGULATING RE-SALE PRICES AND A MERE NOTICE ATTACHED TO THE ARTICLE; AND THEY UNIFORMLY HOLD THE CONTRACT BINDING, BUT THAT A MERE NOTICE IS INEFFECTIVE AND NOT BINDING.

See the cases collected in the publication recently issued by the Department of Commerce of the United States, Bureau of Corporations, entitled

“TRUST LAWS AND UNFAIR COMPETITION”
issued by the Government Printing Office in 1916.

FRANCE:

“Agreements to maintain fixed resale prices are regarded in France as legal and binding. The merchant who cuts the resale price after entering into such an agreement is held to have committed an unlawful act, as well as an act of unfair competition, against those of his competitors who keep their agreements. Such agreements to maintain resale prices are binding only upon the parties to the agreement. The manufacturer or distributor, except as noted above, has no ground for action against a merchant who cuts prices if he has not entered into a contract to maintain it. The following cases will illustrate these principles:

* * * * *

“A dealer in perfumery entered into an agreement with the manufacturer not to sell nor allow to be sold the products at prices below those fixed as a minimum * * * The court sustained the right of the manufacturer to sell his goods subject to such conditions as he might impose upon the purchaser.

“The Society des Eaux minerales de Vittel distributed to the trade a circular, fixing prices * * * The Society brought suit against a certain Brunet for selling below the fixed price. It was proved that Brunet bought the bottles not from the plaintiff but from a dealer who had not imposed any obligation upon Brunet regarding a resale price. The Court refused to consider the notice on the label as binding upon dealers to maintain the price noted thereon, and accordingly held that since no contract existed between the parties Brunet was free to resell his goods at prices that suited him.

Trust Laws and Unfair Competition, p. 579-580, where are given the references to the cases.

BELGIUM:

“Defendant, a retailer, made a verbal contract with plaintiff, a manufacturer, not to sell his kind of little cigars below the price fixed by the latter and marked on the box. It was shown that defendants had broken this contract. The Court awarded damages to the plaintiff.

“Defendant sold some little cigars below the price marked on the box. The notice on

the box also stated that anyone not maintaining this price, or, while maintaining the price, depreciated the article by giving premiums, would be prosecuted. There was no contract between the parties to the suit or between the defendant and the distributor to maintain prices. The Court held that in reducing prices defendant had not committed an unfair act against the manufacturer.

“A retailer sold Pall Mall cigarettes at Antwerp and Brussels below the price indicated on the outside wrapper of the boxes. He had not entered into any contract to maintain prices. The Court decided, therefore, that he was not guilty of unfair competition against the manufacturer, holding that the right of the merchant to dispose of his goods as he sees fit is absolute if they have been legitimately procured, that the notice on the goods that they cannot be sold below a certain price does not impose upon them a condition which should be transmitted with them, and that, while the seller can bind the purchaser not to resell below a certain price, and this legal contract is obligatory for the one who makes it, it does not bind others than the contracting parties. The Court further held that the defendant had committed no unlawful act, since it was not alleged that by

conniving with certain purchasers he had obtained from them the goods at prices permitting him to resell at a profit below the fixed prices, causing them in his personal interest to break their contract with plaintiff, nor had he done anything to discredit the products.

“A similar action was brought against the defendant in the above case for selling the “Petit Larousse illustre” dictionary below the price fixed by the publishers. It was shown that the plaintiffs had refused to deliver their books to defendant, because he would not agree to maintain the price, and that in spite of this defendant had procured indirectly a large number of copies which he sold below the fixed price. The Court of Appeal did not consider how the defendant procured the books, but decided that he had not committed an act of unfair competition in cutting the resale prices, since he was not bound by any contract.

“An association of manufacturers of pharmaceutical products sought to maintain a fixed price by various tactics, such as refusing to deliver to dealers not parties to the agreement, or delivering to them only at the price fixed for sale to the public, so that it was impossible for them to make any profit. The Court held that while the manufacturer

or proprietor of a product is free to sell it at any price that he chooses or to refuse to sell it at all, and can also impose upon the purchaser the condition not to resell except at a fixed price, and concerted tactics of the defendant association were a restraint of the freedom of commerce and industry."

Trust Laws and Unfair Competition, pp. 592-593, where are cited the authorities quoted.

GERMANY:

"Contracts by which producers bind the persons to whom they sell not to resell at less than a fixed minimum price are considered legal in Germany and the breach of such contracts constitutes an act of unfair competition which affords a ground for injunction and the recovery of damages. * * *

"A retailer who was not bound by contract sold some goods below the retail price fixed by the factory. The factory brought suit under section 1 of the law of 1909 Sec. 826 of the Vicil Code on the ground that the defendant was cognizant that all of the customers of the factory were bound not to sell below a fixed price. The Court rejected this view and held that a factory could not prohibit a third party with whom it had no contract from

selling its products at a lower price than the minimum which it had fixed, for the goods might have been secured from some middleman who was not bound by the party who bought the goods from the factory."

The Court said in part:

"In any case we cannot agree with plaintiff that an act repugnant to good morals is involved merely in the reselling of the goods for less than the price imposed by the plaintiff upon his customers. The defendant has the right to sell the goods, which he has procured in an honest way, at any price satisfactory to him. If he is to act in a manner contrary to good morals, an element of unfairness must be involved, such as causing the party from whom the goods were purchased to break his contract with the plaintiff. In the absence of such an element, such agreements between manufacturers and wholesalers would, from the standpoint of the plaintiff, have, so to speak, a material effect, and a shackling of business would result which would be altogether unendurable, and which in certain cases might itself even be considered as repugnant to good morals.'"

* * * * *

In another case of the same kind the defendant,

in selling cigarettes at a discount, removed the identifying number, so that it was impossible for the exclusive agent to ascertain which middleman was breaking his contract by not binding sub-dealers. The Court held that the defendant had committed an act repugnant to good morals by wilfully abetting the breach of contract of his suppliers, by buying at various times from them the cigarettes of the plaintiff sold in violation of the agreement made with the plaintiff, by removing the identifying number in order to prevent anyone from finding out his source of supply, and by selling the goods at less than the fixed price. Such acts, the Court held, were not in harmony with the rules of propriety observed by all just and reasonable men and were a violation of section 1.

Trust Laws and Unfair Competition, pp. 651-652, where are cited the authorities quoted.

In considering the Miles Medical Company and "Sanatogen" cases and their application in a case involving a different state of facts, or rather a total absence of the facts on which those decisions depend, it is well to bear in mind the observation of the Court in the "Sanatogen" Case that,

"No more is to be decided in each case than is directly an issue."

XV.

TO SUPPORT THE DECREE APPEALED FROM IN THIS CASE IT WILL BE NECESSARY TO DECIDE THAT A PRINCIPAL CANNOT MAKE IDENTICAL CONTRACTS WITH A LARGE NUMBER OF AGENTS AND CONTROL THEIR CONDUCT AS SUCH AGENTS IF TO DO SO WILL FORBID THOSE AGENTS FROM COMPETING WITH EACH OTHER AND THEREBY WITH THE PRINCIPAL HIMSELF.

But if the Court finds itself able to disregard the contract and convert a consignment into an absolute sale, it will further be necessary, to support the decree, to hold that a patentee cannot **by contract** restrict the price at which **the party contracting** may sell the patented article, a limitation never heretofore imposed.

We have discussed these phases of the case thus fully, and may well conclude this part of our argument by quoting from the Button Fastener Case (77 Fed. 288-294) which has met the approval of the Supreme Court, and is the logical predecessor of the Dick Case:

“Upon what authority are we to circumscribe the exercise of the privileges awarded

a patentee? In considering any question in respect of restraints upon the liberty of contracting, imposed by principles of public policy, we should bear in mind that very high considerations of public policy are involved in the recognition of a wide liberty in the making of contracts, this caution was well expressed by Sir George Jessell in *Registering Co. v. Sampson*, L. R. 19 Eq. 462-465, who said:

‘It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is against public policy, because, if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider,—that you are not lightly to interfere with this freedom of contract.’

“Especially is this caution applicable when we sit in judgment upon the limitations which a patentee may put upon the use of his invention.”

Under any view of the contract there was no undue restraint of trade.

XVI.

APPLICATION OF THE RULE OF REASON.

We are now ready to advance with the argument a step further and submit that it is immaterial whether the contract under discussion created an agency or effected a sale, for the reason that under the rule of reason as laid down by the Supreme Court in the Standard Oil and Tobacco cases the Sherman law has not been violated.

We submit that the contract between the plaintiff and its agents does not restrain trade within the meaning of the Sherman Act but is only a reasonable provision for the conduct and extension of plaintiff's business and the sale of its products. While the contract fixes the prices at which Ford automobiles can be sold to the public, that is not the only or the principal end sought but is only incidental.

Plaintiff seeks by its agency contract, among other things, to be represented by agents who will not only advance the sale of Ford automobiles but at the same time maintain the standard of service and accommodation to Ford owners which is so

important to the popularity of an automobile and more than anything else promotes its sale.

In this connection we can well quote the language used by the Circuit Court of Appeals for the eighth circuit, speaking by Judge Sanborn, in the case of **Joseph P. Whitwell v. Continental Tobacco Company, et al.** (125 Fed. 454), 64 L. R. A. 694, 695, 697:

“If, on the other hand, it promotes, or but incidentally or indirectly restricts, competition, while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation. *Hopkins v. United States*, 171 U. S. 578, 592, 43 L. ed. 290, 296, 19 Sup. Ct. Rep. 40; *Anderson v. United States*, 171 U. S. 604, 616, 43 L. ed. 300, 306, 19 Sup. Ct. Rep. 50; *United States v. Joint Traffic Asso.* 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245.

“If the contract, combination, or conspiracy which is charged against the defendants

in this case there is nothing of this character. The tobacco company is a manufacturer and trader, and McHie is its employee. Conceding, for the purpose of the argument only, but not deciding, that there may be a contract, combination, or conspiracy in restraint of trade between an employer and his employee, no such contract, combination, or conspiracy between them can be a violation of this law, unless it is in restraint of interstate commerce; and the only combination charged against the defendants is their combination to make sales of the commodities of the tobacco company profitable to purchasers to those persons only who refrain from dealing in the wares of their competitors. The two defendants in this case have never been and never intended to be competitors. There has never been any competition, actual or possible, between them, and hence no competition between them is or can be restrained by their combination to conduct the trade of the tobacco company. The contract, combination, or conspiracy charged against them did not restrict competition between them and the independent manufacturers or dealers who, according to the complaint, were their competitors, because it left the latter free to select their purchasers and to fix the prices of their

goods and the terms at which they would dispose of them to all intending purchasers.”

And the same court speaking again by the same judge said, in **Phillips v. Iola Portland Cement Co.**, 125 Federal, 594, 595.

“* * * the only defendant served with process, answered that the contract was illegal and void under Act Cong. July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200), because it provided that Parr & Co. should not sell the cement, ship it, or allow it to be shipped, without the state of Texas.

“It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the anti-trust law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate com-

merce within the meaning of that law, and is not obnoxious to its provisions. This act of Congress must have a reasonable construction. It was not its purpose to prohibit or to render illegal the ordinary contracts or combinations of manufacturers, merchants, and traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states. *Hopkins v. U. S.* 171, U. S. 578, 592, 19 Sup. Ct. 40, 43 L. Ed. 290; *Anderson v. U. S.* 171, U. S. 604, 616, 19 Sup. Ct. 50, 43 L. Ed. 300; *U. S. v. Joint Traffic Ass'n*, 71 U. S. 505, 568, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 245, 20 Sup. Ct. 96, 44 L. Ed. 136; *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 339, 340, 342, 17 Sup. Ct. 540, 41 L. Ed. 1007; *U. S. v. Northern Securities Co. (C. C.)* 120 Fed. 721, 725. The application of this rule to the facts of the case in hand leaves no doubt that there was nothing in the contract before us obnoxious to the provisions of the anti-trust law of 1890. The Iola Cement Company had no monopoly of the manufacture or sale of ce-

ment in the United States. It was surrounded by competing manufacturers, and the contract which it made with Parr & Co., of Galveston, had no direct or substantial effect upon competition in trade among the states. It left the manufacturers who were competing with the plaintiff for the trade of the country free to select their customers, to fix their prices, and to dictate their terms for the sales of the commodities they offered, so that in this regard no restraint whatever was imposed."

The rule applicable is summed up in *Bigelow v. Calumet & Hecla Mining Co.*, 167 Fed. 704-712, where the court said:

"We are thus brought to the question whether the necessary effect of the alleged combination is to restrain trade or create a monopoly. It is settled that a combination does not violate the federal statute merely because it may indirectly, incidentally, or remotely restrain trade or tend towards monopoly. If its necessary effect is to stifle or to directly and substantially restrict interstate commerce, it falls under the ban of the law. On the other hand, if it only incidentally or indirectly restricts competition, while its main purpose and chief effect

are to promote the business and increase the trade of the consumers, it is not denounced or voided by that law. U. S. v. E. C. Knight Co., 39 L. Ed. 325, 43 L. Ed. 290-300."

No fact or evidence or statement exists in this case to justify even an inference that trade in automobiles has been in the least restrained by the contract under discussion.

There is nothing in the record in the case at bar to indicate that the contract therein involved was anything more than one of "the ordinary contracts or combinations of manufacturers, merchants, and traders," or that it contained anything more than "the usual devices to which they resort to promote the success of their business, to enhance their trade, and to make their occupations gainful."

It is contrary to the knowledge and experience of every man in the community to claim that such a contract could have any effect to restrain trade in automobiles, when it is common knowledge and every-day experience that the different makes of automobiles are too numerous to keep track of, all actively and persistently competing for business. The difficulty that confronts the public is not a trade unduly restrained, but rather how to escape

the solicitations of rival agents eagerly hunting down a prospective or possible purchaser.

As was said by the Circuit Court of Appeals for the fifth circuit, in the case of *Cole Motor Car Co. v. Hurst*, 228 Fed. 280:

“There are a multitude of other companies from whom purchasers can readily obtain motor cars, varying in little, if anything, from the perfectibility of the car made by the plaintiff company. It is common knowledge that most, if not all, of such motor companies avail themselves of similar arrangements. The public, indeed, finds it no small task to avoid the competition and solicitations of the agents or consignees of such companies. Periodicals of every description portray, advertise, and enlarge upon the variety and superiority of their excellencies. There surely, then, has been no restraint of this trade. Was it not, then, easily possible that in the flourishing counties of the Lone Star State enumerated in the contract, notwithstanding the same, any one might have purchased a Ford, a Cadillac, a Pierce-Arrow, a Packard, a Chalmers, a Hudson or any other of the multitudinous machines which are being constantly manufactured and offered for sale at widely vary-

ing prices? Where, then, is the restraint of trade in this transaction?"

It is beyond question that contracts of the character under discussion, not only do not operate to restrict competition, but on the contrary stimulate the agents to greater zeal and activity in pushing sales and thereby directly stimulate competition.

The restraint if any is so far a mere incident to the main purpose of extending the sale of the manufactured product that it cannot bring the contract within the provision of the Sherman act without running counter to the rule of reason which forms the guide to the consideration of the law by the Supreme Court.

The changed view point from which these questions are to be considered was succinctly stated in the case of *O'Halloran v. American Sea Green Slate Co.*, 207 Fed. 187-190.

"The contention for a long time made, and still continued by many, that any agreement which to any extent and in any degree whatever effects or restricts and limits interstate commerce is illegal is not supported by the recent decisions of the Supreme Court, and it seems to be settled that there must be an undue restriction or restraint,

the question of fact to be settled by the court applying the rule of reason."

In discussing the cases in which the Supreme Court enunciated the rule of reason, Judge Lacombe, **United States v. Hamburg-American S. S. Line, et al.**, 216 Fed. 971, 972, 974, said:

"The writer's opinion as to what, under prior decisions, was the construction to be given to the Sherman Anti-Trust Act, will be found fully set forth in *U. S. v. American Tobacco Co.* (C. C.) 164 Fed. 700. If that construction were followed in this case, there could be no doubt as to the conclusion to be reached upon the facts proved. It is practically not disputed that, by the various agreements and conferences which together constitute the combination complained of, that branch of trans-Atlantic commerce which is concerned with the transport of steerage passengers is arbitrarily interfered with so that the proportions of it carried by the various lines, which have so combined, are not as they would be if full, free and unrestricted competition were the sole controlling power to effect the distribution.

"Since the decision above cited, however, there have been two exhaustive opinions of the Supreme Court dealing with this act.

Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. The effect of these would seem to be that contracts and methods of business, which do in fact restrain or interfere with competition, are not to be held obnoxious to the provisions of the act, unless such restraint or interference is 'unreasonable' or 'undue.'

“Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs, which it was thought would flow from the undue limitation or competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusions that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on

the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy. * * *

The statute * * * evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint. *Standard Oil Co. v. United States*, 221 U. S. 58, 59, 60, 31 Sup. Ct. 515, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734."

"Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil Case* that as the words "restraint of trade" at common law and in the law of the country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the

public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.' *United States v. American Tobacco Co.*, 221 U. S. 179, 31 Sup. Ct. 648, 55 L. Ed. 663."

In *United States v. Reading Co.*, 226 U. S. 324, 57 L. Ed. 243-258, the Supreme Court restates the rule as follows:

"That the act of Congress does not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose, was pointed out in the *Standard Oil Case*, 221 U. S. 1, 55 L. Ed. 619. In that case it was also said that the words "restraint of trade' should be given a meaning

which would not destroy the individual right of contract, and render difficult, if not impossible, any movement of trade in the character of interstate commerce, the free movement of which it was the purpose of the statute to protect."

In *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232-5, the Supreme Court again referred to the *Standard Oil* and *American Tobacco Company* cases, and said:

"Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of interest or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

It will puzzle the most astute to bring the contract in the case at bar within the prohibition thus defined.

A contract creating an agency and providing for consignments for sale to the agent, does not disclose any such "intent," nor is its "inherent nature" calculated to unduly or otherwise restrict competition as forbidden by the Sherman law. Nor is there anything in this record from which the

court can conclude that competition has been **unduly restrained** or restrained at all.

It is evident from the language of the law itself and from the numerous cases interpreting it that the object of Congress in the adoption of the Sherman law was not to prescribe the manner in which the individual should conduct his business,—whether directly or through the agents chosen by him—but rather to forbid and prevent combinations between individuals who might otherwise be competitors, whereby that competition may be in any way restrained. It does violence to the language of the contract between the Ford Motor Company and its agents; it does violence to the manifest intent of regulating the manner in which the company's business should be conducted by its agents; it is a logical absurdity, to say that the contract in question is a contract in restraint of trade under the Sherman law.

It is on the contrary a contract whereby the Ford Motor Company seeks to obtain and secure the widest possible stable market, and the most satisfactory of all advertisements of any business—a body of satisfied customers who have reason to believe each one has received as fair and equitable treatment as any other purchaser of Ford automobiles.

As was said in Whitwell against Continental Tobacco Company:

“If on the other hand it promotes or but incidentally or indirectly restricts competition while its main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it, then it is not a contract, combination, or conspiracy in restraint of trade, within the true interpretation of this act, and it is not subject to its denunciation.” And see authorities cited.

No other automobile manufacturer has combined with the Ford Motor Company, but the Ford Motor Company competes in the open market with scores upon scores of other makers of automobiles and the purpose and effect of the contract under consideration is to make that competition as effective as possible, and not to restrain it.

In the Whitwell case just quoted from, the court used the following language which is persuasive in this case:

“The right of each competitor to fix the price of the commodities which he offers for sale, and to dictate the terms upon which he will dispose of them, is indispensable to the very existence of competition.”

And again:

"The tobacco company, and its competitors were not dealing in articles of prime necessity, like corn and coal, nor were they rendering public or quasi public service, like railroad and gas corporations. Each of them, therefore, had the right to refuse to sell its commodities at any price. Each had the right to fix the prices at which it would dispose of them, and the terms upon which it would contract to sell them. Each of them had the right to determine with what persons it would make its contracts of sale.

* * * There is nothing in the act of July 2, 1890, C. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3200) which deprives any of these competitors of these rights. If there had been, the law itself would have destroyed competition more effectually than any contracts or combinations of persons or of corporations could possibly have stifled it. The exercise of these undoubted rights is essential to the very existence of free competition, and so long as their exercise by any person or corporation in no way deprives competitors of the same rights, or restricts them in the use of these rights, it is difficult to perceive how their exercise can consti-

tute any restriction upon competition or any restraint upon interstate trade."

It will doubtless be claimed that from the fact that by the terms of the contract the Ford Motor Company received 85% of the list price of its automobiles and that is the maximum amount of **cash** it expected to obtain, it follows that there was actually a sale to the agent and not a consignment, and this contention has been advanced notwithstanding the clear language of the contract and the agreement that either party might at any time, on notice, cancel the contract and the Ford Motor Company might take back the automobiles and return the 85%, and notwithstanding the other conditions of the contract by which both parties made clear their intention to enter into the relationship of principal and agent, with absolute control by the principal over all transactions in its behalf by the agent.

And there is nothing to impugn the absolute good faith of the contract.

But it is not true to say that the 85% was all that the Ford Motor Company expected to receive from the sale of its machines and the contract contains provisions for other considerations moving to the Ford Motor Company, considerations that, from the standpoint of a manufacturer producing each year hundreds of thousands of automobiles, are

more important than the profit on sales brought about by any local agents.

With a product of such magnitude the problem of reaching the market and obtaining customers, each one of whom must be induced to be a booster for the "Ford," is of far more importance than the mere percentage of profit on specific sales.

With a buying public, in the main ignorant of the qualities of the machine purchased, it is a matter of common knowledge that the popularity of different makes of automobiles depends mainly on the quality of the service given by the selling agents.

Automobiles of no special merit as compared with others selling at the same or lower prices have had a wide popularity because of the carefully cultivated belief of the public that owners of such machines are well taken care of and given good service by the representatives of the manufacturer wherever found.

On the other hand other makes of automobiles of equal or greater merit have been hopelessly condemned and the manufacturer driven into bankruptcy because of the failure of the manufacturer to secure that character of representation by agents that gives satisfaction to owners.

It is a truism that a "satisfied owner is the best advertisement."

To get this character of representation and secure this advertising as a basis on which to build future business of larger dimensions, is the real motive and consideration of the contract under consideration.

For these reasons the Ford Motor Company requires in its contracts with its agents that all agents equip proper shops and be prepared to give, and to give "Ford Service" to Ford owners the world over, no matter where the particular purchase may have been made.

From the broad point of view of a manufacturer of a large and increasing product, looking to the future and a greater business, this is the one most important feature of the agency contract, and all else is subordinate to that and of minor importance.

For today only it might be easier to sell f. o. b. factory, and today the Ford Motor Company might be able to thus dispose of its output.

But to build up and maintain and increase business, a broad, forward looking plan is needed, and of the contracts under consideration we can say, as was said in the case of *Whitwell v. American Tobacco Co.*, hereinbefore quoted from, that the

“main purpose and chief effect are to foster the trade and to increase the business of those who make and operate it.”

When the contract is thus capable of a reasonable interpretation based on sound business principles, the only interpretation consistent with the language and intent of the contract, what justification can be found for going outside the record, into the realm of speculation and suspicion, to suggest a sinister purpose to evade a law, and based on such assumed purpose, read into the contract a meaning of which the language is incapable, and therefrom draw the conclusion that the Ford Motor Company is conspiring with its own agent to violate the law, by restraining trade in its own product, for which it had supposed it was trying to obtain the widest market, through the heretofore lawful plan of controlling its own agents.

It is sometimes true that a court may “read between the lines” of a contract to enable it to get at the real intentions of the parties, but never is it permissible to disregard entirely “the lines” of the written contract and find a new and different contract in the blank spaces between the lines. •

The unauthorized and wrongful use of the trade name and trademark of plaintiff, the wrongful use of the word “Ford,” and other words and phrases,

for the purpose of diverting plaintiff's trade from plaintiff or its duly authorized agents, constituted unfair competition, and an injunction should be granted against its continuance.

Furthermore, the limited agency contract, and other contracts between plaintiff and its agents in consigning Ford cars to them, and granting to each agent exclusive territory, are valid contracts, and will be protected by the courts, and the defendants are guilty of unwarranted and malicious interference with such contract rights. The bill plainly alleges, and the motion to dismiss admits, the vicious and unlawful acts of defendants in inducing plaintiff's agents to break their contracts. The bill of complaint discloses that plaintiff grants to each of its licensed agents a particular and exclusive territory within which such agents are licensed to solicit and arrange sales of Ford cars. A licensed agent in return agrees that he will only solicit and arrange for sales within his particular territory; such contracts granting an exclusive agency within a limited territory are uniformly upheld.

The bill plainly alleges the persistent and continuous efforts of defendants to induce the agents of plaintiff to break their contracts, and to enjoin such wrongful acts is a recognized duty of courts of equity.

Plaintiff was clearly entitled to the relief prayed for and denied by the District Court.

Respectfully submitted,

PLATT & PLATT,

McDOUGAL & McDOUGAL,

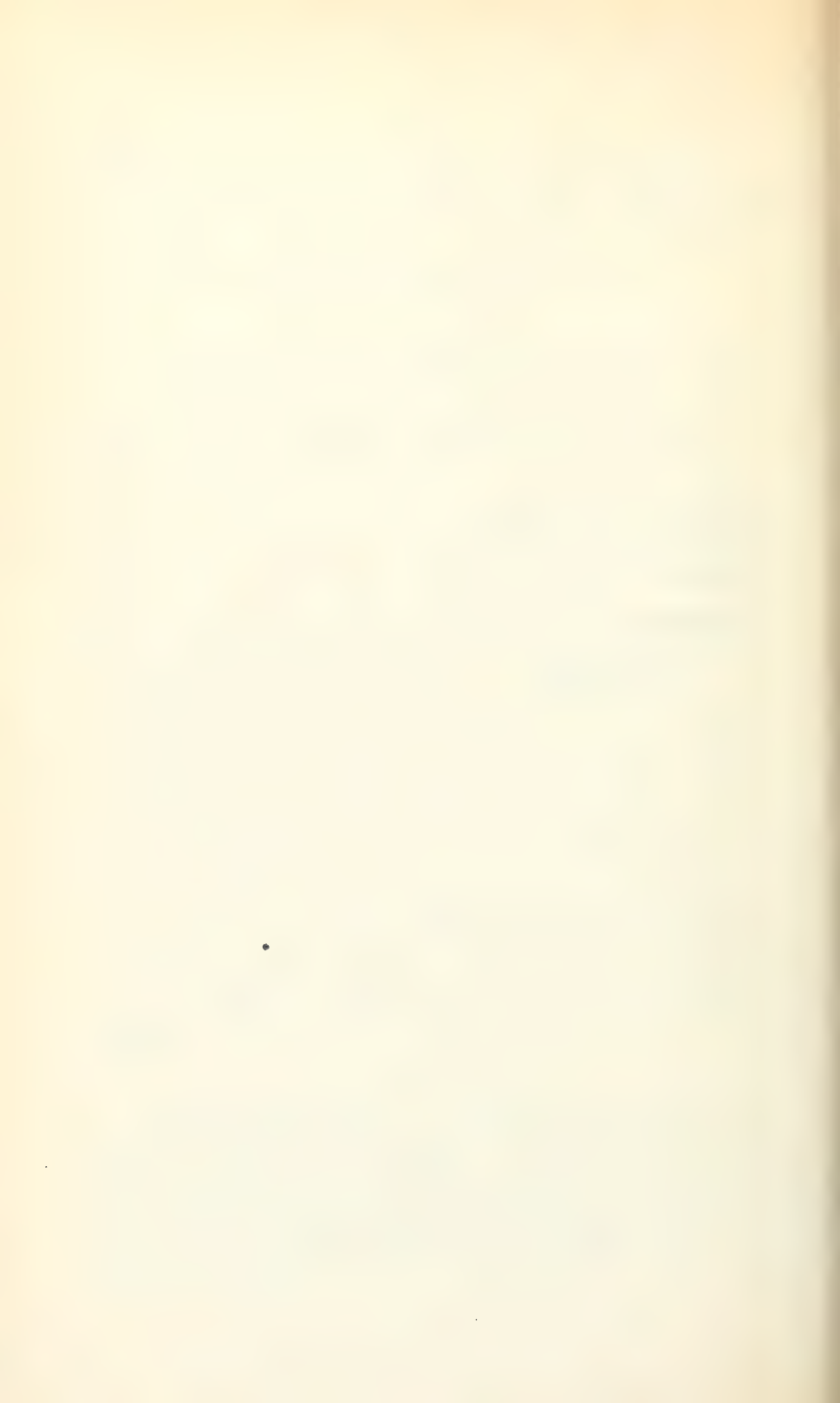
Attorneys for Plaintiff and Appellant.

ALFRED LUCKING,

L. B. ROBERTSON,

HARRISON G. PLATT,

Of Counsel.



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a Corporation
PLAINTIFF AND APPELLANT

VS.

BENJAMIN E. BOONE, Inc., a Corporation,
BENJAMIN E. BOONE
and **BENJAMIN E. BOONE, Inc., a Corporation,**
D. R. BOONE and NORA CARLYLE,
a co-partnership, doing business as
BENJAMIN E. BOONE & CO.
DEFENDANTS AND APPELLEES

Supplemental Brief of Plaintiff and Appellant

PLATT & PLATT
McDOUGAL & McDOUGAL,
Attorneys for Plaintiff and Appellant.

ALFRED LUCKING
L. B. ROBERTSON

HARRISON G. PLATT, DISTRICT ATTORNEY FOR THE DISTRICT OF COLUMBIA
of Counsel.

Filed

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F. D. Monckton

United States Circuit Court of Appeals

For the Ninth Circuit

FORD MOTOR COMPANY, a corporation,
Plaintiff and Appellant,

v.

BENJAMIN E. BOONE, INC., a corporation,
BENJAMIN E. BOONE and BENJAMIN E.
BOONE, INC., a corporation,
D. R. BOONE, and NORA CARLYLE, a co-part-
nership, doing business as BENJAMIN E.
BOONE & CO.,
Defendants and Appellees.

Supplemental Brief of Plaintiff and Appellant

Since the writing of the plaintiff's brief in this case and its filing under the rules, reports of two decisions have become available in cases recently decided by the Supreme Court of the United States, which it is proper and necessary to consider as bearing upon the case at bar.

Motion Picture Co. v. Universal Film Co.,
37 Sup. Ct. R. p. —.

Straus, et al., v. Victor Talking Machine Co.,
37 Sup. Ct. R. p. —.

both decided April 9th, 1917.

THOSE CASES ARE NOT CONTROLLING OF THE PRESENT CASE.

I.

It is impossible to read these two cases together without drawing the conclusion that the Court was taking the utmost pains to make it clear that the Court was passing only upon the validity and efficacy of the notice attached to the patented article to bind the general public in the use of the article after it has been fully paid for—most of the members of which public would never see or read the notice, as the Court points out.

IN THE MOTION PICTURE CASE, the majority opinion in nine different places emphasizes that that question is whether *by notice* or *by mere notice* the patentee may impose upon the public the restrictions as to use of the patented machine with unpatented supplies.

The Dick case was overruled.

The right of the manufacturer to fix the price of his article to the public by contract with the jobber was not involved or discussed.

The great hardship and injustice of the monopoly

proposed by the plaintiff's plan in the Motion Picture case was dwelt upon by the Court and it impelled the Court to use the following extraordinary language:

"The perfect instrument of favoritism and oppression which such a system of doing business, if valid, would put into the control of the owner of such a patent would make Courts astute if need be to defeat its operation. If these restrictions were sustained plainly plaintiff might for its own profit or that of its favorites, by the obviously simple expedient of varying its royalty charge, ruin anyone unfortunate enough to be dependent upon its confessedly important improvements for the doing of business."

After giving an outline of the case, Mr. Justice Clarke, who wrote the majority opinion, says (*italics ours*):

"This state of facts presents two questions for decision: First, may a patentee license another to manufacture and sell a patented machine and by *a mere notice* attached to it, limit its use by the purchaser or his lessee, the films which are not patented. Second, may the assignee of a patent which has licensed another to make and sell the machine, by *a mere notice* attached to such machine, limit the use of it by the purchaser or his lessee to terms not stated

in the notice, but which are to be fixed after sale by such assignee in its discretion.

" * * * The inquiry is as to the extent to which a patentee or his assignee is authorized by our patent laws to prescribe *by notice* attached to a patented machine conditions of its use and the supplies which must be used in the operation of it, under pain of infringement of the patent.

"The statutes relating to patents do not provide for any such notice * * * neither one (R. S. 4900, 4901) contemplates the use of such a *license notice* as we have here and whatever validity it has must be derived from the general and not from the patent law.

"The extent to which the use of a patented machine may validly be restricted to specific supplies or otherwise by special contract between the owner of a patent and a purchaser or licensee is a question outside the patent law and with it we are not here concerned." (Citing 157 U. S. 659.

Clearly, the Motion Picture case has no direct bearing upon the questions in the case at bar.

IN THE STRAUS-VICTOR CASE, the Victor Talking Machine Company gave contracts called licenses, whereby for a fixed sum paid in advance, the licensee was given possession and use of the article during the life of the patent, at the end of which time the title passed to the licensee without

further payment, if he had complied with the conditions. The Victor Company brought suit for injunction against Straus to enjoin the defendant from "selling the machines which they had acquired, from other violations of plaintiff's rights under its patents, and for damages."

The Court in stating the case uses and throws into prominence by capitals ten different times the words, "*License Notice*," under which plaintiff sought to enjoin defendant, and then proceeds to state the issue as follows:

"The abstract of bill which we have given makes it plain; that whatever rights the plaintiff has against the defendant must be derived from the *LICENSE NOTICE* attached to each machine, for no contract rights existed between them, the defendants being only members of the unlicensed general public; and that the sole act of infringement charged against the defendants is that they exceeded the terms of license notice by obtaining machines from the plaintiff's wholesale or retail agents and by selling them at less than the price fixed by the plaintiff. * * *

"Is it the fact, as is claimed, that this *LICENSE NOTICE* of the plaintiff is a means or agency designed in candor and good faith to enable the plaintiff to make only that full, reasonable and exclusive use of its invention which is contemplated by the patent law, or is it a disguised attempt to control the prices of its

machines after they have been sold and paid for. * * *

"While as if looking to the future, the notice, in terms, imposes various restrictions as to title and as to the use of the machines by plaintiff's agents and by the 'unlicensed members of the public,' for itself it required * * * that all it asks or expects at any time to receive for each machine must be paid in full before it parts with possession of it. * * *

"This system, elaborate to the extent of confusion, fails utterly to provide for entering any evidence of a qualified title in any public office or in any public record and no requirement is found in it for reporting by users or licensees, who may remove from one place to another and take a machine with them. If the plaintiff intended to enforce the rights asserted in the notice; if the system were really a genuine provision designed to protect through many years to come the restricted right to use and the seemingly qualified title which it purports to grant to dealers and to the public, from being exceeded or departed from. * * *

"If it were a reasonably guarded plan, really intended to keep the plaintiff in touch with each of its machines until the expiration of the patent of latest date, for the purpose of insisting upon its being used in the manner provided for in the *LICENSE NOTICE*, the plaintiff's prompt and sufficient remedy for such an inva-

sion of its right as is claimed in this case would be found in its sales department, or rather in its license department, and not in the courts.

* * * The scheme of distribution is not a system designed to secure to the plaintiff and public the reasonable use of its machines within the grant of the patent laws, but is in substance a mere price fixing enterprise which, if given effect, would work great and widespread injustice to innocent purchasers, for it must be recognized that not one purchaser in many would read such a notice. * * * ”

The Court makes it plain that it passes only upon the effectiveness and validity of the *license notice*. It finds that the plan is not a genuine one for the protection of the plaintiff's interests, but a disguised attempt to control the prices to the public after it has once been paid in full.

It will be recalled that in the case at bar plaintiff seeks to have defendants enjoined from doing certain things which unlawfully and fraudulently interfere with plaintiff's business. It is charged and admitted that the defendants have fraudulently and unlawfully, for the purpose of misleading the public, copied and made use of the plaintiff's trade marks, names, and other emblems, and falsely and fraudulently represented that they were plaintiff's agents. These, and other wrongful acts are admitted, and to that portion of the plaintiff's grounds of complaint the two decisions in question can have

no possible application. That portion of plaintiff's complaint to which it will be claimed that these two recent cases have application, is that where in is set out a contract between plaintiff and its agents pursuant to which such agents sell for plaintiff plaintiff's manufactured product, and whereby it is charged that the defendants have fraudulently and wrongfully persuaded agents of plaintiff thus bound to plaintiff by contract relations, to violate such contract. Both the acts and wrongful motive therefor are admitted by the defendants, and it is admitted that they were done "with the deliberately fraudulent intent and purpose of defrauding the plaintiff and its duly authorized agents, and of misleading the public and prospective purchasers of Ford automobiles."

So far as these decisions are concerned, therefore, we have the case of a contract duly entered into between the plaintiff and its agents, with which contract the defendants have wrongfully interfered. It may be attempted to justify, or rather excuse, that admittedly fraudulent interference by contending that the contract between the plaintiff and its agents was a contract which the parties thereto could not lawfully enter into. We endeavored in our principal brief to point out the distinction to be found in all the decisions between a case like this where the control exercised is by direct contract enforceable between the parties thereto, and the attempt to control by *a mere notice* attached to the article to be sold.

There have been a number of cases where it has been sought in a suit charging infringement of patent rights, to enforce the right to control after a sale by a mere notice attached to the article, and the courts, notably in the Sanatogen case, have held that a violation of the notice does not constitute infringement. We have been at some pains in our principal brief to point out this distinction.

It will be seen that the issues as stated by the Court in the Motion Picture and Victor cases relate only to the question of the right to control the future of a patented article *by notice* attached to the machine. The cases do not in any respect discuss or consider the right of a patentee to appoint agents and control the acts of those agents by any form of contract or any conditions which the principal and agent may agree upon. There is, however, clearly drawn a distinction between the right to control the use of the machine itself and the attempt to control the materials to be used with the machine, which is pointed out by the Court in this language:

“The difference is clear and vital between the exclusive right to use the machine which the law gives to the inventor and the right to use it exclusively with prescribed materials to which such a license notice as we have here seeks to restrict it. The restriction of the law relates to the useful and novel features of the machine which are described in the claims of the patent; they have nothing to do with the materials used

in the operation of the machine; while the notice restrictions have nothing to do with the invention which is patented but relate wholly to the materials to be used with it. Both in form and in substance the notice attempts a restriction upon the use of the supplies only and it cannot with any regard to propriety in the use of language be termed a restriction upon the use of the machine itself."

We again call attention to the fact that in the case at bar there has been no attempt to control *by notice* the future disposition of the patented article or the material to be used with it. We have only before us a contract between the plaintiff and its agents relating to the patented article itself, and nothing more, with which contract the defendants have admittedly wrongfully interfered. As the Court said in the case under consideration, "this construction gives to the inventor the exclusive use of just what his inventive genius has discovered." In the Motion Picture Patents case the Court found it necessary to overrule its prior decision in the case of *Henry v. Dick Company*, for the reason that that decision had allowed the patentee *by notice* to prescribe the material to be used with the patented article, and had thus, as the Court believed in the subsequent opinion, created a right not founded in the patent law.

In our principal brief we discussed the *Dick* case at considerable length for the purpose of pointing

out the distinction between a right founded on a direct contract, and one asserted through *a notice* attached to the patented article, and we expressly disclaimed any right based *on notice*, and the Dick case was only valuable to us insofar as it contained a discussion and recognition of the distinction.

Both the Motion Picture and Victor cases were suits for infringement against members of the general public, who had acquired the patented articles with no restriction upon their rights thereto, other than that attempted to be created by the *license notice* attached to the machine. There was some general language used which at first blush might seem to bear adversely upon the position of the Ford Motor Company, but the same is quickly seen to have no application when we consider the difference in the facts and the position of the parties before the Court. The Ford Motor Company is not before the Court seeking to control the action of parties who have purchased from its agents where those agents have violated their duty to their principal, but only to restrain outside interference with the relations existing by contract between principal and agent. The Ford Motor Company does not sell its machines to dealers and then attempt to control the conduct of those dealers, and does not sell except to the general public, and it relies upon the relation of principal and agent for the protection of its market and the public, and the security of the service to the public hereinafter discussed. It does not at-

tempt to project any control over the machine after sale *by notice* affixed to the machine, as in the Motion Picture Patents case and the Victor Talking Machine case. It, therefore, does not become necessary for the Ford Motor Company to resort to patent infringement suits, or other means, to enforce the provisions of a license notice. It only asks of the Court that admittedly fraudulent and wrongful interference with its trade name, its trade mark, and its contractual relations with its agents be not interfered with, and that such interference be enjoined by a court of equity.

If third parties wrongfully, maliciously and designedly interfere in the relations between principal and its agent we invoke what this Court has declared to be

"the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract to the injury of the other, and that in the absence of an adequate remedy at law equitable relief will be granted."

If an agent of the Ford Motor Company without such outside interference and solicitation should violate its contract the Ford Company would know how to protect itself by dispensing with the services of that agent, and replacing him with one more reliable. It is a reasonable presumption that the

agents would have continued satisfactory and faithful representatives had they not been over-persuaded by the defendants to violate their contracts, and we are none the less entitled to have interference enjoined though we might have temporarily settled the difficulty by discharging the agents, leaving the defendants free with their malicious attempts to corrupt the successor of the agents, or any other agent to whom they might have access.

The whole purport of the decisions in the Victor case and the Motion Picture case was to discuss the *license notice*, and its failure as a means to project the owner's control beyond a sale, and the Court said in conclusion as perhaps a final reason :

“For it must be recognized that not one purchaser in many would read such a notice, and that not one in a much greater number if he did read it could understand its involved and intricate phraseology, which bears many evidences of being framed to conceal rather than to make clear its real meaning and purpose.”

We submit that a consideration of these cases supports the distinction which we have so carefully endeavored to point out between the attempt to project control over the future use and disposition of a patented article by a *mere notice* attached thereto and the right on the part of the manufacturer to control the conduct of its sales agents bound to it by written contract. This case involves the inter-

pretation of a written contract and the right of the plaintiff to have defendants enjoined from an interference with its business, its trade marks, its advertising, its agents, in a manner admitted by the Motion to Dismiss to have been wrongful and fraudulent, and designed to wrong plaintiff and to deceive the public.

So far as the contract is concerned, there is nothing but the language by which it can be interpreted, and there is no evidence that it means anything different from what the language expresses, except what may be described as the "internal evidence." The District Court thought it saw in such internal evidence that which satisfied it that the relations between the Ford Motor Company and its agents were not those of principal and agent, but those of vendor and vendee. While we have urged, and still urge, that this contract cannot be interpreted to be other than a contract of agency without violating all the accepted canons of interpretation of contract, nevertheless it seems clear that even though it be assumed for the purpose of argument that the relationship was that of vendor and vendee, yet under the Bement case, and other cases cited in our brief, the Ford Motor Company was within its rights in attaching conditions by *contract* to the use which such vendee could make of the machine, the territory in which he could re-sell it, and the price at which he should sell. From such restriction no monopoly results or restraint of trade within the meaning of

the Sherman Law, as interpreted by the Supreme Court under the Rule of Reason, as discussed in our original brief, pages 121, 137.

It will thus be seen that the cases thus decided on April 9th by the Supreme Court do not control this case. On the contrary, they very carefully eliminate and set to one side the question presented here of the right of a manufacturer of a patented product to make valid and enforceable contracts with dealers providing in good faith for the protection of the plaintiff's interests, and as incident thereto, the right to agree with the dealer on stipulations as to price at which the patented article shall be sold in the first instance to the consuming public.

II.

The Supreme Court has never held that a manufacturer may not contract to receive some consideration for his patented article besides money; and has never found, as a matter of law, that parties may not stipulate for benefits to arise to the manufacturer as a distinct part of the consideration, although not in cash.

The right to impose conditions in sales of patented articles has been repeatedly affirmed by the Supreme Court, and in those cases the Court has declared that such conditions, when agreed to, are valid and must be observed.

Mitchell v. Hawley, 16 Wall. 544;
Bement Case, 186 U. S. 91.

The wide distinction between the force and effect given to a signed contract between competent parties as contrasted with a mere notice to the public has been pointed out and dwelt upon and enforced by many courts. (See our original brief, pages 100 to 111 inclusive.)

And in the Bement case the Court said:

“Any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal.”

Bement Case, 186 U. S. p. 91.

The foregoing language has never been overruled or questioned, so far as we know.

In the Mitchell-Hawley case, which is a leading case, the Court said:

“And consequently a patentee when he has himself constructed a machine and sold it without any conditions or authorized another to construct and sell or construct and use and operate it without any conditions, and the consideration has been paid to him, the rule is well established that the patentee must be understood to have parted to that extent with all his

exclusive right. * * * Sales of the kind may be made by the patentee with or without conditions as in other cases, but where the sale is absolute and without any conditions the rule is well settled the purchaser may continue to use until worn out, etc."

It seems to be conceded on all sides that the manufacturer is entitled to receive his full price and that until he does receive his full price any conditions imposed in good faith for the purpose of securing this full price or full consideration are valid and enforceable. Whether enforceable by an infringement suit or by the usual remedies for breach of contract is unimportant in this case, because jurisdiction exists, in any event, on account of diversity of citizenship.

It is very evident that the Court in the Motion Picture case draws a distinction between the rights of the patentee which may be enforced by infringement suit and those which may be secured only by enforcing the contract between the parties.

We submit that no licensee or purchaser gets any right in a patented article except by his contract, whatever it may be. A wrongdoer who breaches the exclusive rights of the patentee may be held liable either to injunction or to damages for the infringement, but where the defendant claims his rights under the patentee, whether the suit be an infringement suit or otherwise, the rights of the parties

must be determined by construction of the contract existing between the parties.

As a matter of law, the patentee who vends his article upon conditions must have the same right to enforce the conditions which constitute the consideration for the article, whether those conditions relate to the payment of money or the delivery or performance of some other valuable thing. It certainly cannot be possible that the courts will hold where a purchaser agrees to pay a certain amount of money and also to perform some other act, which, together, constitute the consideration, such a purchaser may disregard and breach the stipulation as to the other thing, but must pay the money. The courts cannot recognize any such distinction as that.

If this is so, then a stipulation for certain acts and conduct on the part of the purchaser forming the consideration for the article or part of the consideration for the article are enforceable; and this is so, notwithstanding it may lead to a monopoly in that particular article if it be a patented article. On the other hand, if it relate to unpatented articles the stipulation to do or perform some act outside of the payment of money must be to do or perform an act not in violation of the Sherman Law.

It is agreed on all sides that the plaintiff is entitled to his full price.

We deny absolutely plaintiff has received its full

price when only the money has been paid and the other provisions of the consideration have not been performed. We deny, as a matter of fact, and we deny as a matter of law, that under such circumstances we have received our full consideration.

We have a right to make stipulations which will bring good reputation to our cars—to provide for *service* to the purchasers of our cars after they have been transferred, and to make that provision adequate and full. And any stipulation in good faith designed for this purpose is not only valid but is in the interest of the public in the highest sense.

The great value of *service*, the great importance of it to the plaintiff in the building up of its business and the tremendous importance of it to the automobile-owning public are recognized authoritatively and very strikingly pointed out by the Seventh Circuit Court of Appeals in the Prest-O-Lite case, in which Circuit Judge Baker, among other things, said:

“So it is apparent that something more is involved here than the question of rights flowing from the sale and purchase of original Prest-O-Lite gas packages. That something more is an incorporeal right that may best be called *service*, the right to serve and be served. * * *

“With such contingencies in mind appellee established a system of *service*. By an expenditure of over \$1,000,000 appellee enabled more

than 600,000 users of Prest-O-Lite to get a new supply in every city and town and nearly in every village in our land. For an original Prest-O-Lite gas package the customer paid \$25.00; for each subsequent package \$2.50 and the surrender of the empty steel bottle. * * * In all its advertisements appellee offered this *service* to its customers; and the record shows that they accepted the offer and expected to and did receive the *service* as part of what was paid for by the original \$25.00. * * *

"While *service* is not trade in articles of commerce * * * and the ultimate fact of importance is that in the automobile world Prest-O-Lite came to stand not only for the physical article, but also for the incorporeal right to serve and be served."

Search Light Co. v. Prest-O-Lite Co.,
215 Fed. 695.

So, in this case it is proved to a demonstration that the great and important object of these contracts was to secure that constant, uniform and convenient *service*. This was the great purpose and object to be attained by the appointment of dealers each with limited territory and bound by contract to keep the parts on hand and to furnish this service to Ford owners. The fixing of the commission of fifteen per cent to the dealers (thereby fixing the price to the public) is an absolutely necessary incident to produce and bring about this service, this

maintenance of a garage and stock of parts. They could not be questioned by any honest man. Therefore, the main aim and object of these contracts is not only legitimate, not only laudable and praiseworthy, but in the highest degree beneficial to the public.

Each case must stand upon its own facts. The rule of reason must prevail, and unless the contracts are found as a matter of fact to be prejudicial to the public interest they will be upheld.

Unless this Court shall find, as a matter of fact, from *the record* that the stipulations and conditions in this contract were a mere subterfuge under which to set up the price-fixing scheme without the genuine purpose or object of furthering plaintiff's legitimate business, free from monopolistic purposes, then it seems to us the Court can not pronounce these contracts invalid.

Unless the Court finds as a matter of fact that the particular arrangement in question is prejudicial to the public interest, then under the rule of reason lately adopted by the Supreme Court construing the Sherman Act, it cannot be pronounced invalid.

What object can the plaintiff have in fixing the profit going to the dealer unreasonably high? Its one great object is to increase the sales of its own article, and this object would be defeated if it place

the price unreasonably high, because the public will not buy it; and if he have temporary success, such price invites hosts of competitors to enter the field.

We insist upon the absolute morality of the rule of uniform prices upon a single article of production, where there is abundant competition in the same line. We deny any public benefit to be derived from compelling price cutting in a single article of a single manufacturer where large numbers of others are engaged in the same business, as in the automobile business.

We beg to emphasize to the Court the tremendous and vital importance in automobile manufacturing of the right to make contracts to provide for prompt and efficient *service* to the owners of automobiles. The owners of the automobiles are not experts, they are operating an intricate and delicate machine. A slight flaw or misadjustment results in the destruction of the utility of the car for the time being. It is of the highest importance, not only to the plaintiff and all automobile makers, but to the general public and drivers of automobiles everywhere, that good service should be provided for in all places and as conveniently as possible. It would be a great damage to the general public to hold that contracts which in their nature are designed for the purpose of producing this *service* to the great body of automobile owners, are invalid. The automobile business in its very nature demands that this *service* be

given; and in this respect differs from the ordinary commercial business.

Respectfully submitted,

PLATT & PLATT,
McDOUGAL & McDOUGAL,
Attorneys for Plaintiff and Appellant.

ALFRED LUCKING,
L. B. ROBERTSON,
HARRISON G. PLATT,
Of Counsel.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a
corporation,
Plaintiff and Appellant,
vs.

BENJAMIN E. BOONE, INC., a
corporation; BENJAMIN E.
BOONE and BENJAMIN E.
BOONE, INC., a corporation;
D. R. BOONE and NORA
CARLYLE, a co-partnership,
doing business as Benjamin E.
Boone & Co.,
Defendants and Appellees.

Brief of Defendants and Respondents

Upon Appeal from the United States District
Court for the District of Oregon.

LITTLEFIELD & McGUIRE
Attorneys for Defendants
and Respondents

E. V. LITTLEFIELD
of Counsel

Filed

MAY 1911

F. D. Monahan

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Court for the District of Oregon.

STATEMENT.

The Ford Motor Company, complainant, manufactures at Highland Park, Michigan, vast numbers of a machine popularly known as "Fords"; a

term which complainant claims as a trade-name. The public has applied to it another name, to-wit: that of "flivvers," under which it is as equally well known, but we do not understand that complainant lays claim to that.

These "Fords" it transports in interstate commerce in an unassembled condition to various branch factories throughout the United States, where the mechanism is placed together, tested by the branch factories and in turn shipped to practically every city, town and hamlet of the United States. The company designates one or more persons in each locality to whom it ships its products for sale. It is the universal practice to accompany the bills-of-lading with drafts covering 85% of the retail list price of the car. The local dealer before receiving the machines from the common carrier pays the draft and freight charges. The eighty-five per cent referred to is all that the Ford Motor Company ever receives for its products. The fifteen per cent remaining becomes and is the property of the dealer.

Notwithstanding these facts, the company, by a system of contracts, which it alleges is in universal use, and which are hereinafter discussed in detail, endeavors to control not only the price which it shall receive for its products, and the persons to whom it sells the same, but also the price at which the dealer shall dispose of the cars, to the public, and the persons to whom and the places where he shall market the same.

From the moment that the car leaves the factory of the complainant corporation, that corporation ceases to have any responsibility or obligation with regard thereto, except for defective workmanship and materials, and then only if in its opinion the same were defective.

The defendants are engaged in the general automobile business in the city of Portland, Oregon, are not agents or dealers of the company, and had the temerity to sell Ford cars to the public for \$25.00 less than the price complainant had established as its retail price for new cars.

Complainant, after having made an unsuccessful attempt to enforce its contract system in the state courts of Oregon, brought this suit, complaining that for the purpose of unfairly diverting plaintiff's trade and affording an unfair competition, the defendants have been guilty of the following actions, which it claims are false, fraudulent, unfair and misleading:

(a) The defendants maintain across their place of business the words, "Benjamin E. Boone & Co., automobiles," also the word, "FORDS." (It is not claimed that the defendants are not selling those devices, or that they are selling any other device under the trade-name of plaintiff.)

(b) They have printed certain posters, which have been placed on cans containing automobile oil, bearing what is designated as the "winged pyra-

mid" with script words, "Ford" thereon, imitative of plaintiff's trade-mark, followed after a description of the contents of the can, by the words, "Benjamin E. Boone & Co., Ford Agents, Portland, Oregon." (It is not alleged or claimed that the trade-mark of plaintiff was ever by it applied or registered to oil products, or that defendants were claiming to be agents of the Ford Motor Company.)

(c) They have represented to prospective purchasers of Ford cars that defendants were Ford agents, that they obtained Ford cars in quantity from plaintiff's main factory at Highland Park, Michigan, or from the **duly authorized** factory branch at Portland, Oregon, or other factory branches elsewhere. (It is not alleged that defendants were "agents" for the sale of Ford cars, or that they are not obtaining such cars from some one of the places mentioned, or that they are selling some other product under the name of the trade-name of plaintiff.)

(d) That they have procured certain persons having contractual relations with plaintiff, at Woodburn, Oregon, Kelso, Washington, and other places to breach their contracts with plaintiff.

(e) They caused to be printed in the telephone directory at Portland the following: "Boone, Benj. E. & Co., Ford Auto Agency, 514 Alder St., Main 3966." (That defendants did not and do not claim to be agents of the plaintiff corporation is evident from plaintiff's own exhibit "D," (Abstract of Record, 39), a public advertisement in the "Oregon

Journal," where the defendants, in large type, expressly disclaim such relationship. "We are NOT agents of the Ford Motor Co. Our Territory is Unlimited.")

(f) That defendants advertised for sale new Ford automobiles, alleged to have been obtained from agents of plaintiff, at the price of \$467.50, which is greatly below the price at which plaintiff and its agents are permitted to sell said automobiles. (This is the REAL question at issue. SHALL THE FORD MOTOR COMPANY BE PERMITTED TO USE THE COURTS OF THE UNITED STATES TO MAINTAIN THE PRICE OF ITS DEVICE?)

The system of contracts referred to have been under the examination of six different judges of the state courts of Oregon, in addition to being construed by the District Court of the United States for the District of Oregon, and in each instance, have been held invalid and illegal.

POINTS AND AUTHORITIES.

I.

'The complaint does not allege that the amount in controversy between plaintiff and defendants exceeds the sum of \$3,000.00 exclusive of interest and costs. The Federal Courts therefore have no jurisdiction.

Mayer vs. Cohrs, 188 Fed. 443.

Olman vs. City of New York, 168 Fed. 953, 961.

Dupree vs. Leggette, 140 Fed. 776.

Battle vs. Atkinson, 115 Fed. 384, 385.

Wines vs. Cobb Real Estate Co., 128 Fed. 198.

II.

The complaint affirmatively shows that plaintiff has no means of estimating in money the damage done to it by the defendants, or how much it will, in future, suffer, and that there is no known measure of damages capable of ascertaining the amount of money it will lose by reason of defendants' acts.

III.

The infringement of patent rights is not pleaded, and the alleged rights of complainant as patent proprietors is not involved.

Brown vs. Keene, 8 Peters, 110, 114; also

Robertson vs. Cease, 97 U. S. 646, 648, 649;

Anderson vs. Watt, 138 U. S. 698, 702, 703;

Continental Ins. Co. vs. Rhoads, 119 U. S. 237, 239;

Hanford vs. Davies, 163 U. S. 273, 279.

IV.

The contract is unilateral, lacking in mutuality, and cannot be enforced. The company is under no obligations to do anything. It does not promise to sell, or furnish cars, parts, accessories, or to make its "distributors," or "agents" the sole or only individuals wholesaling or retailing its products in the given community.

Ellis vs. Dodge Bros., 237 Fed.

1 Page on Contracts, Par. 303, 304.

V.

The contract is void and unenforceable as to its provisions relative to fixing retail prices, territory, and persons to whom the wholesaler and retailer may sell Fords.

Ford Motor Co. vs. Union Motor Sales Co.,
225 Fed. 373.

VI.

.. The contract is an adroit attempt to avoid the consequences of the following decisions of the federal courts, and to cover up the real nature of the transaction between the plaintiff and the wholesale and retail dealers in its products.

John D. Park vs. Hartman, 153 Fed. 24, 12
L. R. N. S. 135.

Bobbs-Merrill Co. vs. Straus, 210 U. S. 339,
52 L. Ed. 1041.

Dr. Miles Medical Co. vs. John D. Park &
Sons, 220 U. S. 373.

Standard Sanitary Mfg. Co. vs. U. S., 226
U. S. 20.

Bauer & Cie vs. O'Donnell, 229 U. S. 1, 57
L. Ed. 1041.

Straus vs. Am. Pub. Assn., 231 U. S. 222, 58
L. Ed. 192, L. R. A. 1915 A. 1099.

Straus vs. Victor Talking Machine Co., No.
374 October Term 1916, decided April 9,
1917.

VII.

Rights conferred by patents are indeed definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, rights which may be pushed to evil consequences and therefore restrained.

Standard Sanitary Mfg. Co. vs. U. S., 226 U.
S. 20, 49.

VIII.

The term vend as used in both copyright and patent statutes has the same meaning, but that right, made exclusive by law, does not confer the right to fix the re-sale price of the particular patent or book copyrighted.

Straus vs. Am. Pub. Assn., 231 U. S. 222, 58 L. Ed. 192.

Bauer & Cie vs. O'Donnell, 229 U. S. 1, 57 L. Ed. 1041.

IX.

A scheme of contracts perpetuating monopoly and in restraint of trade under either copyright or patent laws, cannot escape the prohibition of the Sherman act.

Straus vs. Am. Pub. Assn., **supra**.

Bauer & Cie vs. O'Donnell, **supra**.

THE CASE OF DR. MILES MEDICAL CO. GOVERNS

The complainant cannot prevail. The contract which it seeks to protect has been condemned by the Supreme Court in numerous cases commencing with that of,

DR. MILES MEDICAL CO. vs. PARK &
SONS, 220 U. S. 373,

as being in restraint of trade, and creating a monopoly.

With each decision ingenious counsel have attempted by various subterfuges to avoid the force and effect of the ones preceding it, but with one exception, that of the case of *Henry vs. Dick Co.*, 224 U. S., the Supreme Court of the United States has insisted that words cannot be permitted to conceal thought, desire and intention, and that the spirit of the contract must be the test and not its verbal adornments.

We shall not discuss the cases referred to by counsel in their brief at length, and shall not attempt to analyze the earlier cases, or those in nisi prius courts, or even in courts of appeal, rendered in the interim when the broad doctrines of law were being developed.

We take this course not with any feelings of disrespect for counsel, for it has been a very real pleasure to follow and study their very able pre-

sentation of the case, but because the highest tribunal of the land has by its decisions, gradually cleared the field of doubt and vexation which surrounded the question of the rights of manufacturers of both patented and unpatented goods, and of copyright proprietor to control the re-sale price of their products, and enunciated that as to all goods, the patentee, copyright proprietor and manufacturer may determine the price which they receive for their product, and even limit its use, but when once they have received the consideration asked, or granted full license to use, they have no further right of control, either by contract license or notice.

In the *Dr. Miles Medical Co.* case the company complained that the defendant knew of its system of contracts, but notwithstanding such knowledge had procured the complainant's goods by inducing its retail agents to violate their contracts, and "prayed for an injunction restraining the defendant from inducing or attempting to induce any party to any of the said 'wholesale or retail agency contracts,' to 'violate or break the same, or to sell or deliver to the defendant, or to any person for it' the complainant's remedies," from procuring or attempting to procure in any way any of these remedies from wholesale or retail dealers who had executed the contracts; from advertising, selling or offering for sale the remedies obtained by any of the described means at less 'than the established retail price thereof,' or to dealers who had not entered into contracts with the complainant; from

in any way obliterating, mutilating, removing or covering up the labels and cartons upon the bottles containing the remedies, and from making sales without such labels and cartons, and the letterpress and numerals thereon, being intact. There was also a prayer for an accounting." 220 U. S. 382.

It would be difficult to imagine a case wherein the ultimate facts were more like those in the case at bar, or where the relief sought was so similar.

In that case, as in this, counsel for the complainant with force and no small amount of ingenuity, urged that the contract was one merely of agency and bailment, that the goods were not sold but merely consigned, that a manufacturer had the right to dictate to his agents the price at which they should sell, that the owner of consigned goods was at perfect liberty to bind his consignee to sell the same for him at a certain minimum price, that one who maliciously contrived to have such agents, bailees and consignees breach their contracts with the manufacturer was guilty of a wrong from the continuance of which a court of equity would enjoin him.

These general propositions the Supreme Court admitted without argument, but rendered them totally inapplicable by approving the findings of the Circuit Court of Appeals, that the contract was merely **"an effort to disguise the wholesale dealers in the mask of agency, upon the theory that in that character one link in the supression of the 'cut rate'**

business might be regarded as valid,, and that under this agreement the jobber must be regarded as the general owner, and engaged in selling for himself and not as a mere agent of another. 90 C. C. A. 581, 164 Fed. 805."

The Court further quoted with approval the opinion of Mr. Justice Lurton in the opinion of the Circuit Court of Appeals in the case of,

JOHN D. PARK & SONS CO. vs. HARTMAN, 12 L. R. A. N. S., on page 147, 82 C. C. A. 158, 153 Fed. 24, 42,

as follows:

"The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant and not to sell at less than a standard price named in the agreement. Thus all room for competition between retailers, who supply the public, is made impossible. IF THESE CONTRACTS LEAVE ANY ROOM FOR THE USUAL PLAY OF COMPETITION BETWEEN THE DEALERS IN THE PRODUCT MARKETED BY COMPLAINANT, IT IS NOT DISCOVERABLE. Thus

a combination between the manufacturer, the wholesalers, and the retailers, to maintain prices and stifle competition, has been brought about."

On pages 34 and 35 of their interesting "argument book," counsel, with remarkable temerity and a refreshing disregard of consequences, state:

"Plaintiff has invoked a rule that is said in *Dr. Miles Medical Co. vs. Park*, 220 U. S. 394, 55 L. Ed. 513, to be 'the established doctrine that an actionable wrong is committed by one who maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, and that, in the absence of an adequate remedy at law, equitable relief will be granted.' "

But in invoking that rule, they necessarily invoke the lightning upon their heads, for in that same case, the Court holds that the contract referred to is invalid, is illegal, is an unlawful restraint of trade and competition, and that a court of equity will not grant relief to complainants who ground their prayer upon such contracts.

THERE IS NO MATERIAL DIFFERENCE BETWEEN THE CONTRACTS OF THE DR. MILES MEDICAL COMPANY, AND THE CONTRACTS OF THE FORD MOTOR COMPANY.

Every vice condemned in the system "adroitly" concocted by the worthy manufacturers of "Perruna" exists in like degree, but adorned with every

refinement and improvement that the mental agility and astuteness of learned counsel can suggest, in the "Limited and Sub-Limited Agency" contracts of the manufacturers of the humble but ubiquitous "flivver." In addition the Ford Motor Company is bolder than the philanthropic doctor who offered the solace of Peruna to the world; for when the ultimate consumer had paid him all that was asked, he was willing that such consumer should re-sell his bottle, or such portion of as might remain to whomsoever he pleased, having in mind, no doubt, the needs of the thirsty in prohibition communities. Not so with complainant in the case at bar. The bill of sale signed by the company, which, we understand, is the intellectual child of one of counsel, attempts to limit the title conferred upon the purchaser by the company's bill of sale.

"First party shall retain all and complete title to each automobile until actual bill of sale, signed and executed by first party, has been delivered to the vendee, WHO SHALL ONLY BE A USER; that is one who has purchased for immediate use and NOT FOR RE-SALE the Ford automobile, at full advertised list price, plus freight and delivery charges, and said United States tax or excise, if any, and without rebate, donation or drawback of any character whatsoever. And any attempt to sell or dispose of or deliver any Ford automobile AT LESS THAN SUCH PRICE SHALL BE UTTERLY VOID AND SHALL PASS NO TITLE WHATSOEVER."

Again—

“and it is agreed that the sale and use of said automobiles as delivered to the third party are restricted according to the terms of this agreement of agency, and that no license to handle or use said automobiles under such patents and applications, except strictly in accordance with the terms and conditions of this contract, is given; that third party’s right to handle and deliver said automobiles embodying said patents and inventions, is restricted and limited by this contract in its terms, and that NO PERSON SHALL ACQUIRE THE RIGHT TO USE SAID AUTOMOBILE OR TO OWN THE SAME IF THERE BE ANY VIOLATION OF THE TERRITORIAL OR PRICE RESTRICTIONS SET FORTH HEREIN, AND ANY SUCH VIOLATION SHALL CONSTITUTE AN INFRINGEMENT OF EACH AND EVERY OF SAID PATENTS, APPLICATIONS AND INVENTIONS.”

CONTRACT, par. 27.

Conceive of the predicament of the unfortunate purchaser who, having bought one of complainant’s cars, is for some reason unable to put the same to “immediate use,” and who may, by the exigencies of life, desire to rid himself of his luckless venture. If he sells the car, he violates complainant’s alleged patent rights, subjects himself and his purchaser to infringement suits, and is himself liable to his purchaser for damages occasioned by his failure to give good title. Or perhaps in his innocence he makes

a trip away from his place of residence, and while away purchases a car from one of complainant's "Sub-limited Agents," who makes the sale despite his knowledge that the purchaser does not live in the "agent's" territory, again this corporation, which lives and breathes to perpetuate and advertise, the fads and fancies of the philanthropic Henry, steps in, claims the car as its own, robs the purchaser of both car and money, sues for infringement of the alleged patents, and subjects him to harrassing and vexatious litigation.

In view of these provisions alone, the court would be amply justified in holding with Mr. Justice Clarke in,

STRAUS vs. VICTOR TALKING MACHINE COMPANY, *supra*,

"The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise, which, if given effect, would work great and widespread injustice to innocent purchasers, for it must be recognized that not one purchaser in many would read such a notice, and that no one in a much greater number, if he did read it, could understand its involved and intricate phraseology, which bears many evidences of being framed to conceal rather than to make clear its real meaning and purpose."

That the court may make a ready comparison of the provision of contract of the Dr. Miles Medical Company, with that of the complainant we have attempted to compile in parallel columns a **resume** of their essential provisions, and submit the following:

**DEADLY
PARALLEL**

DEADLY

DR. MILES MEDICAL CONTRACT.

1. Wholesaler termed "Distributor."
Retailer termed "Retail Agent."
2. Company appoints both wholesaler and retailer of its products.
3. Company's products are "consigned" and not sold.
4. Title remains in company until sale according to contract.
5. Consigned goods unsold at time of cancellation of contract to be returned to company.
6. Freight to be paid by consignee.
7. Consignee to sell only to designated retail agents.
8. Consignee to account and pay to Company proceeds of all sales.

PARALLEL

FORD MOTOR CO. CONTRACT.

1. Wholesaler termed "Limited Agent."
Retailer termed "Sub-Limited Agent."
See Contract, par. 1 and Preamble.
2. Company appoints both "Limited" and "Sub-Limited Agents." See Contract, par. 45, and Preamble.
3. Company's cars are "consigned," not sold. See par. 3 of Contract.
4. Title remains in company until sold according to contract. See paragraphs 12 and 27.
5. Unsold cars to be returned on cancellation at the OPTION of company. See Contract, par. 47.
6. Freight, crating, taxes, insurance, to be paid by consignee. Contract, par. 11.
7. Consignee to sell to "users" only in certain territory, and not for re-sale. Contract, par. 3, 4 and 5.
8. Must sell for cash only, and if for anything else, must remit cash to company. Contract, par. 7 and 38.

9. Consignee to deduct commissions.
10. Advances to be repaid to consignee on cancellation of contract.
11. Consignee guarantees payment on goods sold.
12. Notwithstanding payment of advances title remains in Company until actual sale as provided in contract.
13. Consignee to furnish monthly statement of stock of goods.
14. Failure so to do a ground for cancellation, and return of goods consigned.
15. Company will give all goods a number, consignee must make report of disposition of each dozen or fraction of dozen, specifying such numbers, address and name of persons to whom sold.

9. Company will after payment by purchaser allow consignee commission of 15% of list price. Contract, par. 28.
10. Advances to be returned at option of company if it retakes goods. Contract, par. 47.
11. Consignee pays in advance for all goods "consigned," and guarantees to "arrange sales" for all goods consigned, and if he fails company keeps his "advances." He further agree to take a certain number each year. Contract, par. 10, 22 and 40.
12. Company retains title until issuance of bill of sale by it to vendee who must be a purchaser for "use" and not re-sale, and who has paid full advertised list price, plus freight and delivery charges, etc. Contract, par. 12 and 27.
13. Consignee each week must give report on all goods **sold** or contracted for by him. Contract, par. 17.
14. Company shall order methods of doing business. Contract, par. 44.
15. Consignee will report number and description of car sold, date of sale, name and address of each purchaser. Contract, par. 17.

16. No commission to be due upon goods sold (a) to unauthorized dealers, (b) upon goods not properly reported, or (c) goods sold at prices less than authorized.
17. Violation of foregoing provision renders contract terminable and unsold goods shall be returned at **option** of proprietor.
18. Company specifies and controls prices at which goods shall be sold.

16. Sales outside of territory, at less than list price shall subject consignee to forfeiture of \$250 for each offense. Contract, par. 5, 8 and 26.
17. Violation of provisions as to sales to other than "users," or outside of territory, or at less than list price, renders contract terminable, and unsold cars shall be returned to company **at its option**. Contract, par. 5, 7 and 47.
18. Company controls and specifies prices at which goods shall be sold. Contract, par. 6, 8, 9, 12, 13, 27, 42 and 47.

The only differences existing between the contract of the manufacturers of Peruna, and that of the Ford Motor Company is that the company insists upon issuing a bill of sale for each automobile it sells.

It is hornbrook law that the making of a bill of sale is not necessary to pass title to personal property. Payment of the purchase price and acceptance of the same, even without delivery passes title as between vendor and vendee.

Th only excuse for this bill of sale is TO ENABLE COMPLAINANT TO ENFORCE ITS PRICE RESTRICTIONS, AS BY MEANS THEREOF IT CAN TRACE EACH CAR AND ASCERTAIN TO WHOM IT WAS SOLD, WHERE IT WAS SOLD, AND THE PRICE AT WHICH IT WAS SOLD.

It has, however, another object, that of a cloak of the real transaction. It is admitted that the "agent" before receiving the cars pays to complainant all that complainant ever receives for the same, namely 85 per cent of the list price. The agent pays freight, crating, delivery charges, taxes and insurance. Surely it needs no citation of authority to say that when one receives the price he asks for his product, and delivers it into the hands of the one paying that price, the transaction is a sale, a completed sale, and there remains no right in the manufacturer to further control the disposition of the property, and certainly no right to determine the amount at which it shall be re-sold.

It is apparent therefore that there is no real point of difference between the contracts, and that unless the complaint can establish some right other than that of being the manufacturer of the product to be sold, it has no right to any relief.

Complainant alleges that such right exists by reason that the patent laws grant the privilege to them.

THE COMPLAINT DOES NOT CONTAIN ANY ALLEGATION THAT ANY PATENT HAS EVER BEEN ISSUED UPON COMPLAINANT'S MACHINES.

Counsel states "It appears from the record that Ford automobiles are manufactured under numerous letters patent of the United States and these patents are enumerated in the contract, which is made a part of the complaint. (Transcript, pages 4 and 27.)"

We submit that the record does not show anything of the kind. The only reference to patents is as follows:

"VI.

* * * which automobiles and parts thereof, were invented, developed and fully perfected as the result of years of experience and manufacture and sales thereof by plaintiff, and fully protected by the patent laws." (Abstract of Record, 4.)

"XI.

That under the agency contract of each of the authorized agents of plaintiff, sample copy of said contract being attached hereto and made a part hereof and marked Exhibit 'C,' the agent agrees, etc." (Abstract of Record, 28.)

The remainder of the paragraph does not relate to or in anywise mention patents or patent rights.

Exhibit "C," being a sample form of contract, contains a clause reciting that among other things that the first party, (complainant) owns, and Ford automobiles are manufactured under, and embody the following letters patent of the United States, or some of them (setting out a long list of alleged patents).

The allegations in paragraph VI of the complaint are insufficient; every inventor is "protected by the patent laws," but surely an inventor who sought to prevent an infringement of his invention would be compelled to allege that he had obtained certain letters patent, that those letters patent or the application therefor had been filed and issued prior to the acts complained of (See *Coute vs. Royer*, 155 U. S. 565, 584.) How could the defendants in this case submit an issue on the question raised by the pleading. The complaint does not allege that every allegation of fact in the contract is true, or that such patents were ever issued. The exhibit is offered as a part of the complaint to show the method by which complainant transacted its

business affairs. Defendants could not join issue as to the question of patents in any answer to paragraph XI of the complaint, for the reason that their answer would have to be either an admission or a denial that Exhibit "C" was the **form of contract** used by the Company. An admission that the allegations of paragraph XI are true, i. e., that the company did use such contract forms, would not be an admission that the company in fact owned the patents, that they were still valid and subsisting, that they had ever been issued, or that they were used in the manufacture of a Ford car.

ON THE RECORD AS MADE BY COMPLAINANT'S, THE QUESTION OF PATENT RIGHTS CANNOT BE RAISED.

While not conceding for any purpose that there is any question as to patents involved in this record, the defendants submit to the court that even though every nut, screw, bolt and plate in the machine was manufactured and sold under a valid, subsisting, patent issued out of the United States Patent Office, yet there is no equity in the complaint, and the bill must be dismissed.

Under the provisions of the act of July 8, 1870, (16 Stat. 198, par. 22, c. 230) every patent shall contain "a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery."

The question to be decided is—

DOES THE EXCLUSIVE RIGHT TO VEND CONTINUE TO RESIDE IN THE PATENTEE AFTER HE HAS ONCE EXERCISED IT AS TO A PARTICULAR ARTICLE.—CAN HE CONTROL NOT ONLY THE PRICE WHICH HE WILL RECEIVE FOR IT, BUT ALSO THE PRICE AT WHICH HIS VENDEE SHALL RESELL IT.

The case does not contain any question as to the right to manufacture or the right to use. But we are confronted with the task of determining the extent of the privilege conferred in the “exclusive right to vend” the machine.

This, however, has been settled by the Supreme Court of the United States in the case of

Bauer & Cie vs. O'Donnell, 229 U. S. 1, 13, where it is said:

“So far as the use of the terms ‘vend’ and ‘vending’ is concerned, the protection intended to be secured is substantially identical. The sale of a patented article is not essentially different from the sale of a book. In each case to vend is to part with the thing for a consideration. It is insisted that the purpose to be subserved by notices such as are now under consideration—keeping up prices and preventing competition—is more essential to the protection of patented inventions than of copyrighted articles; and it is said that the copyrighted

article may be and usually is sold for a lump consideration by the author and composer and that he has no interest in the subsequent sales of the work, while the patented inventions require large outlays to create and maintain a market. To some extent this contention may be based upon fact, nevertheless it is well known that in many instances the compensation an author receives is the royalties upon sales of his book or a percentage of the profits, which makes it desirable that he shall have the protection of devices intended to keep up the market and prevent the cutting of prices. **BUT THESE CONSIDERATIONS COULD HAVE HAD LITTLE WEIGHT IN FRAMING THE ACTS.** In providing for grants of exclusive rights and privileges to inventors and authors we think Congress had no intention to use the term 'vend' in one sense in the patent act and 'vending' in another in the copyright law. Protection in the exclusive right to sell is aimed at in both instances, and the terms used in the statutes are to all intents the same. * * * (page 17.) In both instances it was the intention of Congress to secure an exclusive right to sell, and there is no grant of privilege to keep up prices and prevent competition by notice restricting the price at which the article may be re-sold. **THE RIGHT TO VEND CONFERRED BY THE PATENT LAW HAS BEEN EXERCISED, AND THE ADDED RESTRICTION IS BEYOND THE PROTECTION AND PURPOSE OF THE ACT.** This being so, the case is brought within that line of cases in which this court from the beginning has held that a patentee who has parted with a patented

machine by passing title to a purchaser has placed the article beyond the limits of the monopoly secured by the patent act.

* * * 'But in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use, and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees.' "

It is sought to distinguish this case upon the ground that there was no **contractual** question involved, but merely a **license notice**. Counsel say:

"It as held that where a copyrighted book had been sold and passed out from under the monopoly permitted by law the price could not be kept up by **PRINTED NOTICES** of retail price **ATTACHED TO THE BOOK.**" (Brief, pages 107, 108.)

Counsel are in error, the question of notices placed in the books was not even raised in that case, and we can only account for such statement by the fact that an earlier case, that of **BOBBS-MERRILL vs. STRAUS**, 210 U. S. 339, involved such a state of facts, and involved practically the same parties

as the case of *Strauss vs. Am. Pub. Ass'n.*, 231 U. S. 222.

It being established that the proprietor of a patent has no greater privileges to extend the scope of the term "vend" than has a copyright proprietor, we proceed to the destruction of the second line of defenses of intrenched monopoly.

STRAUSS vs. AM. PUB. ASS'N., 231 U. S. 222.

There, copyright proprietors had entered into an agreement not to sell their copyrighted books to book-sellers who would not agree to maintain for one year the agreed net prices. The plaintiffs, doing business as Macy & Co. of New York City, brought suit in the courts of the State of New York, praying for an injunction restraining the Association from carrying out such an agreement, and asking for damages due to their refusal to sell books to plaintiff.

Originally the conspiracy of the copyright proprietors included uncopyrighted as well as copyrighted books, and the courts of New York held the agreement as to them to be illegal as violating the laws prohibiting monopolies and combinations in restraint of trade. The publishers then eliminated uncopyrighted books from the agreement, but insisted that as to those which were under the protection of the copyright laws, they had a right to make such agreements and combinations, whether

in restraint of trade or not, as might be deemed advisable to them.

The Court of Appeals of New York agreed with them, and refused to grant Straus any relief. An appeal was prosecuted to the Supreme Court of the United States.

The case squarely raises the question to be here decided. Unquestionably, if such a contract were legal, not contravening the laws of the United States, Straus could not complain, and if he could not complain, but himself induced parties to such contracts to violate them, he would come within the prohibition of *Bitterman vs. Louisville & Nashville Ry. Co.*, 207 U. S. 1, 38 L. Ed. 171, as approved in the *Dr. Miles Medical Co. case*, *supra*.

For the foregoing reasons an examination of the Supreme Court's decision should bring us to a conclusion decisive of the case at bar.

Said Mr. Justice Day:

"In the case of *Standard Sanitary Mfg. Co. vs. United States*, 226 U. S. 20, this court had under consideration the effect of the patent statutes upon agreements found to be unlawful under the Sherman Law, and the agreements condemned were held not to be protected as within the patent monopoly conferred by the statute. Replying to the contention as to the protection which the patent laws gave to enter into such agreements, this court said (p. 49):

“ ‘Rights conferred by patents are indeed very definite and extensive, but they do not give any more than any other rights a universal license against positive prohibitions. The Sherman law is a limitation of rights—rights which may be pushed to evil consequences and therefore restrained.’

“So, in the present case, it cannot be successfully contended that the monopoly of a copyright is in this respect any more extensive than that secured under the patent law. No more than the patent statute was the copyright act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman law, which is broadly designed to reach all combinations in unlawful restraint of trade and tending because of the agreements or combinations entered into to build up and perpetuate monopolies.” * * *

“We agree with the Court of Appeals in its characterization of the agreement involved in this case, about which there seems to have been no difference of opinion, except as to the supposed protection of the copyright act. It manifestly went beyond any fair and legal agreement to protect prices and trade as among the parties thereto and prevented, as the Court of Appeals said, when dealing with uncopyrighted books, the sale of books of any kind at any price, to those who were condemned by the terms of the agreement and with whom dealings were practically prohibited.”

It will be remembered that the Supreme Court in the case of

Dr. Miles Medical Co. vs. Park & Sons, 220
U. S. 373,

held, that a scheme of contracts practically identical with those in the case at bar were in restraint of trade and therefore invalid, when applied to non-patented articles, and as the distinction between copyrighted and uncopyrighted, patented and unpatented is wiped out by the Straus case, it necessarily follows that complainant's scheme of contracts likewise falls under the ban.

A very recent case, that of

STRAUS vs. VICTOR TALKING MA-
CHINE COMPANY,

decided April 9, 1917, would seem to mark the finish of the last heat in a series of races between astute counsel representing corporations endeavoring by indirection to accomplish that which may not be done openly, and the Supreme Court of the United States.

With all due respect to counsel who drew the contracts of the Ford Motor Company, we must express a belief that their efforts were puny compared to the masterly scheme evolved by attorneys for the Victor Talking Machine Company.

The Victor Talking Machine Company never

mentioned the word sale in its contracts, no one could buy one of its machines, it never sold them to wholesalers, retailers or the public. It "licensed" them for "use" only, it did not exact a price for its machine, but was paid a "royalty" for the license.

Manifestly the "distributors" and "regularly licensed Victor dealers," as they are termed in the Victor contracts, received no title which they could convey, an attempt to convey any title would be void, an attempt to procure them to violate their license contracts and receive less than the "royalty" prescribed would be a malicious wrong against the Victor Talking Machine Company, and manifestly one who obtained machines "covertly" could be restrained from so doing.

Such was the position of the Victor Talking Machine Company, such was the opinion of the Circuit Court of Appeals of Second Circuit, expressed in 230 Fed. 449, but the Supreme Court holds to the contrary:

Says Mr. Justice Clarke:

"It is apparent from the foregoing statement that we are called upon to determine whether the system adopted by the plaintiff was selected as a means of securing to the owner of the patent the exclusive right to use its invention which is granted through the patent law, or whether, under color of such a purpose, it is a device unlawfully resorted to in an effort to profitably extend the scope of its patent at the expense of the general public. Is it

a fact, as is claimed, that this "License Notice" of the plaintiff is a means or agency designed in candor and good faith to enable the plaintiff to make only that full, reasonable and exclusive use of its invention which is contemplated by the patent law or **IS IT A DISGUISED ATTEMPT TO CONTROL THE PRICES OF ITS MACHINES AFTER THEY HAVE BEEN SOLD AND PAID FOR?**

"First of all it is plainly apparent that this plan of marketing adopted by the plaintiff is, in substance, the one dealt with by this court in *Dr. Miles Medical Co. vs. Park & Sons Co.*, 220 U. S. 373, and in *Bauer vs. O'Donnell*, 220 U. S. 1, **ADROITLY** modified on the one hand to take advantage, if possible, of distinctions suggested by these decisions, and on the other hand to evade certain supposed effects of them. * * *

"Courts would be perversely blind if they failed to look through such an attempt as this "License Notice" thus plainly to sell property for a full price and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest. The scheme of distribution is not a system designed to secure to the plaintiff and to the public a reasonable use of its machines, within the grant of the patent laws, but is in substance and in fact a mere price-fixing enterprise, which, if given effect, would work great and widespread injustice to innocent purchasers. * * *

"Convinced as we are that the purpose and

effect of this "License Notice" of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, such as is contemplated by the patent statutes, but that its real and poorly-concealed purpose is to restrict the price of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and the public, we conclude that it falls within the principles of *Adams vs. Burke*, 17 Wall. 453, 456; and of *Bauer vs. O'Donnell*, 229 U. S. 1; that it is therefore, invalid, and that the District Court properly held that the bill must fail for want of equity."

That there may be no question that the contract of the Ford Motor Company falls within the scope of *STRAUS vs. VICTOR TALKING MACHINE COMPANY*, let us apply to it the test prescribed by Mr. Justice Clarke.

We have shown heretofore that as the learned judge said, "It is plainly apparent that this plan of marketing adopted by the plaintiff is, in substance, the one dealt with by this (Supreme) court in *Dr. Miles Medical Co. vs. Park & Sons*, 220 U. S. 373, and in *Bauer vs. O'Donnell*, 229 U. S. 1."

The second test prescribed is as follows:

HAS THE FUTURE ANY RISKS FOR COMPLAINANT, AND DOES IT REQUIRE THAT ALL THAT IT ASKS AND RECEIVES FOR EACH MACHINE BE PAID IN FULL BEFORE IT PARTS WITH POSSESSION OF IT?

The contract provides:

1. If the agent sells for anything but cash, he does so on his own responsibility, and must remit cash to the company. (Contract, par. 7.)

2. Although the company reserves the right to change the retail list price of its machines, yet it will not rebate to the agent the difference between the 85% of the old price and the 85% of the new, as to those machines "consigned" to him more than thirty days prior to the change. **IMAGINE A BONA FIDE CONSIGNOR ATTEMPTING TO COMPEL HIS CONSIGNEE TO STAND A LOSS OCCASIONED BY THE ACT OF THE CONSIGNOR HIMSELF.** (Contract, par. 9.)

3. The "agent" must advance in cash the full amount that the company ever gets for its cars (85% of the retail list price) **at the time of the consignment of the automobiles to him.** (Contract, par. 10.)

4. Although the cars are the property of the consignor, yet the consignee is compelled to pay the freight, and there is no liability on the part of the company to repay such advances. (Contract, par. 11.)

5. Although the only right of the company under the patent law is to limit the use to which a machine may be put, the complainant while conveying full right to use, **attempts to limit the right of the ultimate consumer to re-sell.** The purchaser,

under his bill of sale, gets no title whatsoever unless he has paid the full list price, plus freight, etc., **without rebate, donation or drawback of any character whatsoever.** (Contract, par. 12.)

6. Although the company claims they do not sell the cars to the "Agents," their own contracts refute the claim. If it were a true consignment, the advances could only be made for the purpose of protecting the consignor against the wrongful acts or embezzlement of the consignee. Under the contract, such advances are not to be returned to the "agent" if the carrier by whom it is shipped at the instance of the company, damages the same, **THE DAMAGE FALLS UPON THE HEAD OF THE AGENT.**" It is stipulated that the first party shall not be liable to the third party for any injury or damage to the automobile after it is once delivered to the carrier or **for the return of any advances thereon.** (Contract, par. 20.) This provision alone demonstrates that the transaction is a sale and not a consignment.

7. Still claiming that the payment of the 85% of the retail list price is only an "advancement," the complainant declares: "Inasmuch as the first party bases its output and expenditures upon the **ORDERS** given by its Limited and Sub-Limited Agents, therefore, and in consideration of this contract, the third party hereby agree to arrange sales under the terms of this contract and by and in accordance with the methods herein provided, **of all the automobiles consigned and delivered to him pursuant to his orders for the same, AND FIRST**

PARTY SHALL NOT BE LIABLE TO RETURN TO THIRD PARTY HIS ADVANCES ON SAME. (Contract, par. 22.)

8. The "agent" pays all taxes levied on his stock, and upon any automobiles in his possession, **OR IN TRANSIT ON BILL OF LADING OR OTHERWISE FOR DELIVERY TO HIM.** (Contract, par. 23.)

9. The "agent" is compelled to purchase one of complainant's cars for use as a demonstrator, and agrees not to sell this car, **to which he is given full title,** within less than three months from the date of its purchase by him, **FOR LESS THAN THE FULL ADVERTISED LIST PRICE,** and **WITHIN HIS OWN TERRITORY.** (Contract, par. 26.)

Again we are tempted to a use of the editorial apostrophe—Can there be any doubt remaining that this contract seeks only to control prices of re-sales?

10. By the provisions of paragraph 27 of the contract, it is sought to make the innocent purchaser subject to infringement suits for violation of complainant's alleged patents, if the car which he has purchased was sold in violation of the territorial or price restrictions of the generous, liberal and just contract.

11. Still claiming that the contract is one of agency, and that the cars are merely "consigned," and not sold to the Limited and Sub-Limited

Agents, the Ford Motor Company is not compelled to retake the cars unsold at the cancellation of the contract to repay the advances made by the agent, but **MAY AT ITS OPTION RETAKE POSSESSION.** They may require the agent to continue for three months in an endeavor to sell the cars under the agency contract, **AND IF HE IS UNABLE TO SELL THEM FOR THE COMPANY, THE COMPANY WILL SELL THEM TO HIM PERSONALLY FOR TEN PER CENTUM ADDITIONAL.** (Contract, par. 47.)

The lack of a sense of sardonic humour, cannot be listed among the company's sins.

12. Throughout the contract are numerous clauses which relieve the company from any responsibility for any act of the agent, for any damages done by him, for any debts even those relating to the company's car, which he may create.

Therefore, this scheme of selling comes within the last test laid down by Mr. Justice Clarke, there is no further use remaining in the company, and no responsibility to be incurred by it.

THE CONTRACT IS ALSO VOID FOR THE REASON THAT IT IS UNENFORCEABLE AS LACKING MUTUALITY.

From beginning to the end of the contract there is no liability or obligation on the part of the company toward the agent, they do not agree to furnish any cars whatsoever, or any parts; the contract

expressly provides: "no legal liability to fill such requisitions being incurred under any circumstances." (Contract, par. 41.)

A contract similar in its lack of mutuality of promise and undertaking was construed in the case of

ELLIS vs. DODGE BROS., 237 Fed. 860.

The court said:

"This is fatal to this paper, which as will be seen from the declaration is the basis of the suit. *Morrow vs. Southern Express Co.*, 101 Ga. 810, 28 S. E. 998; *Velie Motor Car Co. vs. Koppmeier Motor Co.*, 194 Fed. 324, 114 C. C. A. 284, *Oakland Motor Co. vs. Indiana Automobile Co.*, 201 Fed. 499, 121 C. C. A. 319. * * *

"So that we come to the proposition as to whether or not there has been such performance of the contract on the part of the plaintiff as would prevent the defendant Dodge Bros., from setting up a lack of mutuality in the agreement between the parties. The agreement has the following provision:

" 'This agreement shall expire by limitation June 30, 1915, or may be cancelled by the manufacturer or dealer upon fifteen days' written notice. The termination or cancellation of this agreement will immediately act as a cancellation of all orders received from the dealer for motor cars or parts

which have not been delivered prior to the date of cancellation.'

"This provision would be fatal to this agreement, as a binding contract between the parties, if it was not otherwise objectionable. *Velie Motor Car Co. vs. Kopmeier Motor Car Co.*, *supra*; *White Co. vs. American Motor Car Co.*, 11 Ga. App. 285, 75 S. E. 345. It seems to me that, with this provision in the contract for its cancellation by either party, and without any reason given therefor, simply the right to cancel at will, it would be practically no contract at all. Even if there were an agreement here on the part of Dodge Bros. to deliver the cars, this right to cancel would seem to nullify any such agreement. To agree to do something and reserve the right to cancel the agreement at will is no agreement at all."

The court will remember a similar provision, paragraph 46, in the contract of the Ford Motor Company.

Counsel find the strongest support of their position in the cases of

BEMENT vs. NAT. HARROW CO., 186 U. S. 70, 46 L. Ed. 1059, and

HENRY vs. DICK CO., 224 U. S. 1, 56 L. Ed. 645

It is to be noted that the first of these cases arose before the period when it became apparent

that the doctrine they promulgated would result in screening attempts to create monopolies under patent licenses, and that the doctrines of the Dick case were supported by only four justices of the nine. Mr. Chief Justice White rendered a lengthy dissenting opinion, concurred in by J. J. Hughes and Lamar, the principles of which have since been concurred in by Mr. Justice Day, who did not sit in the Dick case, and find their enunciation in the Sanitary Mfg. Co. case, *supra*, and in *Bauer vs. O'Donnell*, and in the opinion, to which no dissent was filed, in *Straus vs. Am. Pub. Assn.*, and finally in *Straus vs. Victor Talking Machine Co.*, in which the entire bench concurred.

It will thus be seen that but little weight can be given to those decisions. While they have not been expressly overruled, the court has followed the practice so often observed both in courts, lawyers and laymen, of so limiting and confining the effect of mistaken expressions as to finally rob them of all significance.

For all practical purposes *Henry vs. Dick Co.*, has ceased to be the law. Such is the view evidently of Judge Hollister, expressed in

FORD MOTOR CO. vs. UNION MOTOR SALES CO., 225 Fed. 373, where that learned judge had the benefit of the advice and opinion of the learned Judson Harmon, ex-Attorney General of the United States, and the equally scholarly Mr. Lucking, then, as now, of counsel for the Ford Motor Company. Although the case is a recent one,

is exhaustive on the point in issue here, although counsel, in their able, interesting and extensive brief have attempted to distinguish all cases contrary to their position, and although it involved their client, we have not been able to find a citation to it in their argument. It must have been omitted through inadvertence.

JURISDICTION.

This court has no jurisdiction over this suit for the reason that it does not appear from the complaint that the matter in dispute between the parties exceeds the sum of \$3,000.00 exclusive the interest and costs.

The only allegations on the subject are as follows:

“The amount of the controversy between plaintiff and defendants greatly exceeds the sum of \$3,000.00.” (Abstract of Record, page 4.)

“Nor has plaintiff any means of estimating in money the damage so done to plaintiff, its agents, or the public, nor has plaintiff any means of ascertaining or determining as to how many persons will be deceived in the future by the continuance and threatened continuance of said false and fraudulent advertisements and representations, nor how many will be induced to purchase cars from said defendants by reason thereof, nor will plaintiff be able to determine in an action at law by any known measure of damages the sums of money which it

will lose by reason of such fraudulent and unfair method of doing business, and plaintiff therefore alleges that it has no adequate and complete remedy at law and can only obtain relief by the equitable remedy of an injunction and **accounting.**" (Abstract of Record, page 14.)

It appearing from the complaint that the plaintiff does not know and cannot ascertain how much it is or will be damaged, no jurisdictional amount is pleaded. The allegation in the 4th paragraph of the complaint does not set out that the matter in dispute LESS INTEREST AND COSTS, exceeds \$3,000.00.

MAYER vs. COHRS, 188 Fed. 443,

is in point. The plaintiff there said that the amount of his damage were peculiarly within the knowledge of the defendant. Judge Rudkin said "such averments fail to show that the jurisdictional amount is involved," and sustained a demurrer to the bill.

In,

OHMAN vs. CITY OF NEW YORK, 168
Fed. 953, 961,

Judge Ray said: "A person may not confer jurisdiction on the Circuit Court of the United States by alleging a simple trespass and placing his damages at more than \$2,000.00 when it is perfectly apparent.

on the face of the complaint, he is entitled to nominal damages only.”

Again in,

DUPREE ET AL. vs. LEGGETTE ET AL.,
140 Fed. 776,

the rule was stated to be:

“ ‘When it is properly before the court, the bill will be examined as required by the act of Congress 1888, and, if the jurisdictional facts do not affirmatively appear in the record, the bill will be dismissed. Bates, Fed. Equity Proceedings, par. 11, U. S. Comp. St. Tit. 13, p. 511; Act March 3, 1887, c. 373, par. 6, 24 Stat. 555; Act. Aug. 13, 1888, c. 866, par. 866, 25 Stat. 436.’ ”

“After this an amended bill and answer were filed, and the depositions taken. An examination of the original bill of 28 pages and the amended bill of 30 pages typewritten matter shows the only expression to be found setting forth the matter in dispute, exclusive of interest and costs, is on page 27 of the amended bill as follows: ‘Complainants are informed and believe that the whole of said lands, situated as they are, adjoining an incorporated town and improved as they are, are worth \$12,000 and the amount demanded by them herein is more than \$2,000.’ ”

The jurisdiction of the court being strictly statutory the words of the statutes or form prescribed

should be followed. In the prayer for relief there is nothing to aid the bill or show the amount in controversy, nor is there a demand for any amount.”
 * * * It is therefore considered, adjudged and decreed that the bill herein be dismissed, and the defendants recover their costs, to be taxed by the clerk.”

THE COMPLAINANT DOES NOT PRAY FOR AN ACCOUNTING, ASK FOR ANY MONEY JUDGMENT WHATSOEVER, OR ALLEGE THAT THE CONTRACT TRADE-NAME OR BUSINESS IS WORTH MORE THAN \$3,000.00 EXCLUSIVE OF INTEREST OR COSTS.

We cite the court to,

BATTLE vs. ATKINSON, 115 Fed. 384, 385,
 and

WINES vs. COBB REAL ESTATE CO., 128
 Fed. 198,

to the same effect as the authorities cited heretofore.

“The decisions of this court require that the averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments.”

BROWN vs. KEENE, 8 Peters 110, 114; also

ROBERTSON vs. CEASE, 97 U. S. 646, 648, .
649;

ANDERSON vs. WATT, 138 U. S. 698, 702,
703;

CONTINENTAL INS. CO. vs. RHOADS, 119
U. S. 237, 239.

HANFORD vs. DAVIES, 163 U. S. 273, 279.

IN CONCLUSION.

The bill must fail, and complainant denied the relief sought.

First. Because the bill does not disclose jurisdictional facts.

Second. Because the contracts to be upheld are lacking in mutuality, and are unenforceable.

Third. Because the scheme disclosed involves no facts different from those passed upon in the Dr. Miles Medical Co. case.

Fourth. Because there is no sufficient allegation of the existence of patent rights.

Fifth. Because even though devices manufactured by complainant were in fact covered by valid and subsisting patents, yet the contracts being but a cover of a scheme to fix re-sale prices, are invalid as against public policy.

Sixth. Because a court of equity will not permit itself to be used as a means of enforcing that which is unjust, inequitable and improper.

Respectfully,

LITTLEFIELD and MAGUIRE,
Attorneys for Defendants and Respondents.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FORD MOTOR COMPANY, a corporation,

Plaintiff and Appellant,

vs.

BENJAMIN E. BOONE, INC., a corporation, BENJAMIN E. BOONE, and BENJAMIN E. BOONE, INC., a corporation, D. R. BOONE and NORA CARLYLE, a co-partnership, doing business as Benjamin E. Boone & Co.,

Defendants and Appellees.

PETITION FOR REHEARING.

Upon Appeal from the United States District
Court for the District of Oregon.

ROBERT F. MAGUIRE,

Attorney for Defendants and Respondents.

PLATT & PLATT,

McDOUGAL & McDOUGAL,

Attorney for Plaintiff and Appellant.

ALFRED LUCKING, L. B. ROBERTSON,
HARRISON G. PLATT, of Counsel.

Filed

SEP 21 1917

F. D. Monckton

United States Circuit Court of Appeals

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FORD MOTOR COMPANY, a corporation,

Plaintiff and Appellant,

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Defendants and Appellees.

PETITION FOR REHEARING.

Rehearing should be had in this case for the reason that we believe it plain that the court has proceeded upon a misapprehension, first—as to the nature of the case, and, second—that it has enumerated a doctrine of law which finds no support other than opinions of courts which have been expressly overruled by the Supreme Court of the United States.

The case may be divided into two branches: first, those allegations wherein it is alleged that by the use of various signs the defendant partnership claims to be the agent of the plaintiff corporation; and, second, the allegations that the defendant partnership is inducing the agents or sub-dealers of the plaintiff corporation to violate their contracts.

Inasmuch as this is an action for injunctive relief and not an action for damages by reason of acts done, it would appear that where the plead-

ings affirmatively show that the defendant partnership either has not or is not continuing in the practices complained of, that no ground for injunction lies. The pleading of a party, when contested by demurrer, must be most strongly construed against it. Surely if he bases his cause of action or suit upon an allegation that a certain state of facts exists, and then later on in his pleading specifically alleges that they do not exist, this contradiction destroys his cause of action. The plaintiff complains that, unless restrained by the court, the defendants will continue to mislead the public into the belief that they are authorized Ford agents of plaintiff. (See paragraph 14 of Bill of Complaint.) It appears, however, that subsequent to the institution of plaintiff-appellant's suit, the defendant partnership caused to be inserted in the Portland "Oregonian" and the "Oregon Journal" an advertisement notifying the public generally that it was not an agent of the Ford Motor Company. (See Subdivision "F," paragraph 15 of amended and supplementary complaint, and Exhibit "D.") This exhibit, made a part of their complaint, is a direct contradiction of their allegation that the defendant partnership threatens to and will continue to hold out to the public that it is agent of the Ford Motor Company.

The facts of the case are that up to February 1, 1916, the defendant partnership was a distributor in the City of Portland for the plaintiff corporation; that the word "Ford" painted upon the side of the building was painted there during the time that the defendants were such distributors, and that the defendants were merely selling out

the cans of oil with the labels objected to which had been taken in stock during the period of time when they were such distributors, and the same thing is true with reference to the advertisement in the telephone directory. It is, therefore, apparent that whatever might have been true at the time the supplemental Bill was filed, the defendant partnership had entirely ceased the conduct complained of and had notified the public through public advertisement that it was not an agent of the Ford Motor Company. This phase of the case is, therefore, of little importance and was not deemed such by either party in the court below.

The court has at great length attempted to justify its decision to hold the agency contract a valid contract. An analysis of the opinion indicates that the court justifies its decision upon the ground that the 85% of the retail purchase price is not the entire consideration which the Ford Motor Company receives by reason of the contract. These other considerations the court does not specifically state, but it is quite evident that they cannot consist in other than the observance of the territorial restriction, the price restriction, and the maintenance of repair shop. The fact that these distributors of their own volition do not observe either the territorial or price restrictions in no way affects their ability or their obligation to maintain a repair shop and to furnish this service to which the court calls attention. It is also obvious that they would not sell for less than the retail price to anyone unless it was profitable for them to do so. The court assumes (an assumption, by the way, entirely out of the record) that the purchaser desires the assurance that the ar-

title he purchases is standard; that it has the maker's guarantee that he will be able to procure parts and accessories as he may need them, and, of course, that no question will be raised touching his title. The court says: "*Obviously* the defendant could not give a prospective purchaser all of these assurances." The obviousness of the matter is, we think, entirely open to question. How does the court know that the assurance of Boone & Company that the article is standard and that it has the maker's guarantee is worthless? What right has the court to say that the purchaser cannot obtain parts and accessories, as he wants them, from Boone & Company? What right has the court to question the title of the defendants to these cars more than it has the right to question the title of the plaintiff to the cars? What does the court know, as a court, of the financial standing of either party and of their respective abilities and willingness to comply with their contracts? Is there anything in the pleadings or in the contract to indicate that the purchaser obtains either assurance or security from a purchase through a regular agency?

Again the court says: "The defendants used plaintiff's trade-mark after the manner of a regular Ford agency." There is no such allegation in the complaint, and it is not the fact. It is not alleged that the word "Ford," or "Fords," appearing upon defendants' building, was in anywise similar to or the same as plaintiff's trade-mark, the script "Ford."

The court says: "It is clearly the understanding of the parties that it is a conditional, restricted

sale and that the title passes only upon the compliance with the other conditions, as well as that of paying the 85%." What are those conditions? Are there any other conditions than that the car shall have been sold to an ultimate user, at the price fixed by the company, within the territory allotted the agency? *These other matters—of advertising, rent, taxes, and repair shops, are not the conditions which must be met before title passes,* and it is nowhere claimed in the contract that such is the case.

The court admits that if this were an unpatented article the scheme of selling referred to would be an illegal one, and illegal for two reasons: first, that it is an attempt of the vendor to control the re-sale price of the article; and, second, that inasmuch as the plaintiff corporation attempts by its restrictions to restrain interstate commerce, it is violating the Federal laws touching that subject. The court says in its opinion, in effect, that inasmuch as there are other automobiles in the market it cannot be said that the plaintiff corporation has a monopoly over automobiles and, therefore, distinguishes the case at bar from the case of Motion Picture Company vs. Universal Film Manufacturing Company, where the device was an essential one for the operation of moving picture machines. That the distinction is not a true one is apparent from the fact that the same doctrine of law applied to the motion picture patents case was applied to the Victor Talking Machine case. Surely it cannot be contended that the talking machine made by the Victor Talking Machine Company is the only talking machine on the market and that it is not subject to competition. It is a

matter of common knowledge that there are at least fifteen or twenty other varieties of talking machines upon the market—in fact, the Victor Talking Machine Company has a rival of practically the same strength in the Edison Phonograph Company.

To say that the Ford automobile is in competition with a Packard, a Pierce-Arrow, a Hal-12, a Chalmers, a Cadillac, or a Mercedes—cars costing from three to ten times as much, is to say that a cayuse pony worth \$50.00 competes with a \$25,000 race horse.

We believe the court labors under misapprehensions as to the meaning of the statement found in the Victor Talking Machine case. The court says:

“In the Victor Talking Machine case, *supra*, the court (referring to the Supreme Court of the United States) said: ‘The abstract of the bill which we have given makes it plain that whatever rights the plaintiff has against the defendants must be derived from the ‘License Notice’ attached to each machine, for no contract rights existed between them.’ ”

The mistake under which we believe this court has labored is a total misapprehension of the facts as shown in the Victor Talking Machine case.

This court has assumed that the only question there involved was whether or not a patentee could by a license notice limit the use to which a ma-

chine could be put or the price or royalty which the "distributor" should receive for an assignment of that license to an "ultimate user."

The court further assumes (opinion, page 14) that there was not involved in the case any question of a contract between the manufacturing patentee and his distributors. Such, however, is not the case. The first two pages of the Supreme Court's decision is taken by a recital of the Victor Talking Machine Company's method of conducting its business.

We quote from the decision:

"The plaintiff in its bill alleges: * * * that for the purpose of marketing these machines to the best advantage about August 1, 1913, *it adopted a form of contract which it calls a 'license contract,' and a form of notice called a 'License Notice,' under which it alleges all of its machines, have since that date been furnished to dealers and to the public.*

"This 'License Notice' which is attached to each machine and is set out in full in the bill, declares that the machine to which it is attached is manufactured under patents, is licensed for the term of the patent under which it is licensed having the longest time to run, and may be used only with sound records, sound boxes, and needles manufactured by the plaintiff; that only the right to use the machine 'for demonstrating purposes' is granted to 'distributors' (wholesale dealers), but that these 'distributors' may assign a like right to the 'public' or to 'regularly licensed Victor dealers'

(retailers) 'at the dealer's regular discount royalty'; that the 'dealers' may convey the 'license to use the machine' only when a 'royalty' of not less than \$200 shall have been paid, and upon the 'consideration' that all of the conditions of the 'license' shall have been observed; that the title to the machine shall remain in the plaintiff which shall have the right to repossess it upon breach of any of the conditions of the notice, by paying to the user the amount paid by him less five per cent for each year that the machine has been used. * * *

"The contract between the plaintiff and its dealers is not set out in full in the bill, but it is alleged that since August 1st, 1913, *the plaintiff has had with each of its 7,000 licensed dealers a written contract in which all the terms of the 'License Notice' are in substance repeated and in addition* it is alleged that each dealer 'if he has signed the assent thereto' is authorized to dispose of any machines received from the plaintiff directly or through a paramount distributing 'dealer,' but subject to all of the conditions expressed in the 'License Notice.' It is alleged that this contract contains the provision that 'a breach of any of the conditions on the part of a distributor will render him liable, not only for an infringement of the patent, but to an action on the contract or other proper remedy.'"

After reading that language how can this court say that there was not involved in the Talking Machine Company case anything more than the 'License Notice' theory.

In that case the company specifically reserved

title in itself for a long period of years; having the right to use and vend its patented machine, it deemed it had the right to vend not the title to its machine but only the right to use it under certain conditions.

The Victor Talking Machine Company doubtless had in mind the same "considerations" which under such a system of marketing would accrue to it, as this court has so ably delineated in its opinion, to-wit: that the purchaser "desires the assurance that the article he purchases is standard, that it has the maker's guarantee, that he will be able to procure parts and accessories as he may need them, and, of course, that no question will be raised touching his title."

The Victor Talking Machine Company doubtless felt of the same opinion as this court that "it may decline to deal with the trade at all, and, dispensing with middlemen, sell directly to users, by mail, or through traveling salesmen or local agents. Accordingly it may lawfully appoint an agent authorized to sell its cars (talking machines), limiting his authority to sales within a prescribed territory, and to users, and for a fixed price; and it may impose as one of the conditions of sale that it will not pass title except to the ultimate user and after such price has been paid in full."

Undoubtedly the Victor Talking Machine Company was of the opinion that even though its contract might be construed as effecting a sale, yet, as this court says:

"It is clearly the understanding of the parties that it is a conditional or restricted sale, and that the title to the cars (talking machines) passes only upon a compliance with the other conditions as well as that of paying the eighty-five per cent (there a royalty of \$200)."

We can go even further without in the least straining our analogy. We doubt not that these manufacturers deluded themselves as to their own real objects by making use of language quite similar to that used by this court:

"But were it otherwise, what benefit would result to the public by opening the door for the bushwhacking competition which, and which only, is likely to follow? It is to be borne in mind that the plaintiff (Victor Talking Machine Co) has no monopoly of the automobile (phonograph) business, but only of one out of almost innumerable kinds of cars (phonographs), all differing in detail one from the other, but of the same general type and all designed to be used in the same general manner, and for the same general purpose."

Is there any point of distinction between the product of the Ford Motor Company and that of the Victor Talking Machine, so far as competition and necessity to the public are concerned? The Victor talking machine has many rivals, one of them, Edison's Columbia Phonograph, of almost equal commercial strength and of practically the same popularity with the public. In fact so great is the competition that the Patent Office maintains a division of examiners whose sole work is the examination of patents to phonographs and

talking machines.

Nor can the musical sense of the American people be said to have become so far developed that a phonograph has become a necessity. If, as has been said, a "necessity" is that which we think we must have, I doubt not that the average American family when called upon to choose between its car and its Victrola, would unhesitatingly pass by the "music box" and award the crown to the automobile.

There is nothing that the court says in its opinion that could not with equal justice and propriety be said of the Victor Talking Machine Company.

Another error into which the court fell, will, we have no doubt, be apparent when the court re-examines the Talking Machine case.

The Supreme Court said:

"As to the defendants, the bill alleges that they conduct a large mercantile business in New York City; *that with full knowledge of the terms of the contract, as described, between the plaintiff and its distributors, and of the 'License Notice' attached to each machine the defendants 'being members of the general unlicensed public' and having no contract relation with the plaintiff, or with any of its licensed distributors or licensed dealers, induced 'covertly and on various pretenses,' one or more of plaintiff's licensed distributors or dealers to violate his or their contracts with the plaintiff,* providing that no machines should be delivered

to any unlicensed member of the general public until the full license price stated in the 'License Notice' affixed to each machine was paid, and thereby obtained possession of a large number of such machines at much less than the prices stated in the 'License Notice'; *that under the terms of the said license AGREEMENT and notice*, they have no title to the same, and that they have sold large numbers thereof to the public and are proposing and threatening to dispose of the remainder of those which they have acquired to the 'unlicensed general public,' at much less than the price stated in the notice affixed to each machine."

It is thus apparent that the Victor Talking Machine were not claiming alone under a license notice. They allege a contract, they allege that the defendant Straus had knowledge of the contract, and that he had induced the distributors to that contract to violate the same and dispose of their machines to him at less than the price fixed in their contract.

It is on identical facts that the plaintiff in the case at bar seeks to gain injunctive relief—facts which, though insufficient in the mind of the Supreme Court of the United States, seem to have been sufficient in the mind of Your Honors.

This court has taken the position that in the Victor Talking Machine case, the question before the court was whether or not a license notice system of doing business was valid. Again, we respectfully submit, Your Honors have misconceived the scope of that decision.

Mr. Justice Clarke, on that point says:

“It is apparent from the foregoing statement that we are called upon to determine whether the system adopted by the plaintiff was selected as a means of securing to the owner of the patent that exclusive right to use its invention which it granted through the patent law, or, whether, under color of such a purpose, it is a device unlawfully resorted to in an effort to profitably extend the scope of its patent at the expense of the general public.”

In fact we have found no case where the Supreme Court has ever held that a license notice is of no avail when it is used in a bona fide attempt to retain in the patentee the exclusive right to manufacture, vend, or use its product. It has only been where such a notice has been a part of a mere price fixing scheme—where it is sought to fix retail prices after the patentee has received his price, that the Supreme Court has held them invalid.

Had the transactions of the Victor company been such as to impress the Supreme Court that the *contract* between the company and its “Distributors” was in good faith, a conveyance of only a right to use, and not a scheme to disguise a sale under the form of a “license to use,” the court would have been compelled to sustain the plaintiff’s bill of complaint.

Had they considered a true “license,” then the Supreme Court would have held that the distributor did not receive full title to the machine, and

not having received title he could not convey it to the Straus concern; if the Straus concern were informed or put on guard by any instrumentality, whether by word of mouth, recording of the license, or by a notice placed upon the machine itself—then that concern got no better title than the “distributor” whom it had tempted to break its contract with the patentee—and the Victor Talking Machine Company would have had a perfect cause of suit for injunction, accounting and decree for damages.

But the court properly held that the recitations in this Notice were untrue, that the conditions there were a mere blind, that the title which the “Distributor” received from the patentee was not conditional; that the transaction was a sale; and, finally, that being a sale the attempt to fix the retail price or “royalty” conflicted NOT with the anti-trust law, but with the old doctrine of the common law that restraints upon alienation are odious and will not be upheld.

We have read with interest Judge Dietrich’s views upon the advisability of stifling competition among retailers, and the benefits which accrue to the public in permitting a manufacturer to dictate not only what he shall receive for his product but also what the general public shall pay for it. The doctrine so announced, if sound, applies as well to unpatented as to patented articles. In fact the evil of “bushwhacking competition,” to use Judge Dietrich’s trenchant language, is more apparent and more odious in the case of the manufacturer who has borne the burden of long and expensive advertising and selling campaigns to establish his

market for an unpatented product than in the case of the patentee who at least has a monopoly in the manufacture of his product, and who has a statutory grant to dictate what he will receive for his product.

The doctrine this court has annunciated is the law of Germany, the arguments advanced in its favor by Judge Dietrich have been the arguments offered in support of the Stephens Bill, so often proposed to Congress, but the Congress has consistently declined to adopt such a policy as the economic policy of the United States.

The question is a political one, and until such time as that branch of the government having jurisdiction over such questions of policy sees fit to change it, we submit that the court cannot properly concern itself with its expediency.

This is the view of the Supreme Court, which sweeps aside argument on the question by these words:

“The object of the notice is said to be to effectually maintain prices and to prevent ruinous competition by the cutting of prices in sales of the patented article. **THAT SUCH PURPOSE COULD NOT BE ACCOMPLISHED BY AGREEMENTS CONCERNING ARTICLES NOT PROTECTED BY THE PATENT MONOPOLY WAS SETTLED BY THIS COURT IN THE CASE OF DR. MILES MEDICAL CO. VS. PARK & SONS CO., 220 U. S. 373,** in which it was held that an attempt to thus fix the price of an article of gen-

eral use would be against public policy and void. It was doubtless within the power of Congress to confer the right of restriction upon a patentee. **HAS IT DONE SO?** *The question has not been determined in any previous case in this case so far as we are aware. * * **

In other words, the question before the court is whether or not the exclusive right to "vend," given by the patent statute, includes the right, by contract or otherwise, to fix the re-sale price. The Supreme Court in the case of *Bauer vs. O'Donnell* quoted with approval the language of *Adams vs. Burke*, 17 Wallace 453:

"* * * when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees."

The court, therefore, answers in the negative the question which he put and which we have quoted.

The court cites the case of *United States vs. Keystone Watch Company*, 218 Fed. 502-514, a case based, as the citation shows, upon *Henry vs.*

Dick Co., 224 U. S. 1, and Bement vs. National Harrow Co., 186 U. S. 70. The Supreme Court, in Bauer vs. O'Donnell, *supra*, held specifically that Bement vs. National Harrow Company did not involve the question of the right under the patent law, and the Supreme Court, in Straus vs. Victor Talking Machine Company, specifically overrules Henry vs. Dick, but this court has entirely overlooked and neglected in its decision Straus vs. American Publishing Association, 231 U. S. 222, a case which involved directly the question of contracts and not the question of notice, and dismisses it in its opinion with the statement that the question there was merely a question of conspiracy covering a patented article. Surely if a contract as to one copyrighted book is legal, the publishers would have a right to make a similar contract with every copyrighted book they had. If the Ford Motor Company were manufacturing, under Letters Patent, 85% of the different kinds of motor cars made in the United States, their right to fix the retail price certainly would not be limited by reason of the fact that they owned more than one patent. What they could do with one patent they could do with another. If the court's contention is correct, the more ingenious a man is, the more fertile his brain, the more cunning his mechanical senses, the more is he handicapped under our laws. If he has only enough genius to produce one invention, he may fix the retail price; if he be a genius like Edison and is responsible for a hundred—he is prohibited from so doing. If there were but one copyrighted book those publishers, according to this court's construction of the law, would have the right to enter into a con-

tract; if they had entered into a thousand different contracts among themselves, each covering but one book, then their scheme would not have been subject to attack. Surely that cannot be the law. What may be done in a series of contracts may be done in one contract. The fact still remains that the basis of all these decisions is that a patent or copyright proprietor who has received the full price for his machine cannot control the re-sale price.

In conclusion, we beg from the court a further consideration of this case. We have attacked the court's decision and conclusions with a temerity that may perhaps be charged to youth and inexperience, but we are convinced that the decision as rendered is erroneous and that it should be modified and a rehearing had.

ROBERT F. MAGUIRE,
Attorney for Respondents.

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK P. SNOW and FRANK S. LIVINGSTON, Doing Business as
Partners Under the Name of SNOW MANUFACTURING COM-
PANY,

Appellants,

vs.

KELLAR-THOMASON COMPANY, a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court
for the Southern District of California,
Southern Division.

Filed

JAN 25 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Citation.

UNITED STATES OF AMERICA,—ss.

The President of the United States to Kellar-Thomason Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal entered and of record in the clerk's office of the United States District Court for the Southern District of California, Southern Division, in suit in Equity No. B-65 therein, and wherein you are plaintiff and appellee, Frank P. Snow and Frank S. Livingston, doing business as partners under the name of Snow Manufacturing Company, are defendants, and appellants, to show cause, if any there be, why the decree of said Court made and entered May 25th, 1916, granting and allowing to plaintiffs an injunction against defendants as in said decree set forth should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable OSCAR A. TRIPPET, United States District Judge for the Southern District of California, Southern Division, this 22d day of June, 1916.

OSCAR A. TRIPPET,
United States District Judge.

Received a copy of the foregoing Citation this 26th day of June, 1916.

CHARLES C. MONTGOMERY,
Solicitor for Plaintiff and Appellee. [5*]

[Endorsed]: No. B-65. United States District Court, Southern District of California, Southern Division. Kellar-Thomason Company, Plaintiff, vs. Frank P. Snow and Frank S. Livingston, Doing Business as Partners Under the Name of Snow Manufacturing Company, Defendants. In Equity. Citation. Filed June 26, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [6]

Names and Addresses of Attorneys.

For Appellants:

FREDERICK S. LYON, Esq., 509 Merchants'
Trust Building, Los Angeles, California.

For Appellee:

CHARLES C. MONTGOMERY, Esq., 908
Security Building, Los Angeles, California.
[7]

*Page-number appearing at foot of page of original certified Transcript of Record.

*In the District Court of the United States of
America, in and for the Southern District of
California, Southern Division.*

No. B-65—IN EQUITY.

KELLAR-THOMASON COMPANY, a Corpora-
tion,

Complainant,

vs.

FRANK P. SNOW and FRANK S. LIVINGSTON,
Doing Business as Partners Under the Name
of SNOW MANUFACTURING COMPANY,
Defendants. [8]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY.

KELLAR-THOMASON COMPANY, a Corpora-
tion,

Complainant,

vs.

FRANK P. SNOW & FRANK S. LIVINGSTON,
Doing Business as Partners Under the Name
of SNOW MANUFACTURING CO.,
Defendants.

Bill of Complaint.

To the Honorable the Judges of the District Court of
the United States, for the Ninth Circuit, in and
for the Southern District of California, Southern
Division:

The Kellar-Thomason Company, a corporation

organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the city of Los Angeles, county of Los Angeles, State of California, complainant, brings this its bill of complaint against Frank P. Snow and Frank S. Livingston, doing business as partners under the name of Snow Manufacturing Co., having its principal place of business at Los Angeles, county of Los Angeles, State of California, defendants, and thereupon complaining shows unto your Honors:

I.

That heretofore, to wit, prior to the 29th day of October, 1910, one Geo. E. Kellar of Los Angeles, California, was the original, first and sole inventor of a new and useful irrigating connection, not known or used by others before his invention or discovery thereof, or patented or described in any printed publication in the United States of America, or in [9] any foreign country before his invention or discovery thereof, or more than two years prior to his application for letters patent thereon, in the United States of America, or in public use or on sale in the United States of America for more than two years prior to the said application for letters patent therefor, and not abandoned.

II.

That the said Geo. E. Kellar so being, the original first and sole inventor of the said irrigating connection, heretofore, to wit, on the 29th day of October, 1910, made application in writing in due form of law to the Commissioner of Patents, in accordance with

the then existing laws of the United States, made and provided, and complied in all respects with the conditions and requirements of said laws, that thereafter such proceedings were duly and regularly had and taken in the matter of such application that, to wit, on the 30th day of January, 1912, letters patent of the United States of America, No. 1,016,159 and bearing date of the 30th day of January, 1912, were duly and regularly granted and issued by the Government of the United States to the said Geo. E. Kellar, whereby there was granted and secured to the said Geo. E. Kellar, his heirs and assigns for the full term of seventeen (17) years from and after the 30th day of January, 1912, the sole and exclusive right, liberty and privilege to make, use and vend the said invention throughout the United States of America and the Territories thereof; that the said letters patent were issued in due form of law under the seal of the United States Patent Office and duly signed by the Acting Commissioner of Patents, as will more fully and at large appear from the original letters patent or a duly certified copy thereof which are ready in court to be produced by your orator, and that prior to the grant, issuance and delivery of the said letters patent, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of letters patent for new and [10] useful inventions.

III.

Your orator further shows unto your Honors that by an instrument in writing in due form of law, and signed and delivered by Geo. E. Kellar, the said Geo.

E. Kellar, did, on the 4th day of January, 1912, sell, assign and transfer unto the Kellar-Thomason Mfg. Company, all his right, title and interest in the said invention and in and to the said letters patent, issued therefor, together with all rights of action, claims or demands arising out of or accruing from said letters patent in any manner whatsoever; that said instrument in writing was duly and regularly recorded in the United States Patent Office. That thereafter by an instrument in writing in due form of law and signed and delivered by the Kellar-Thomason Manufacturing Company, the said Kellar-Thomason Mfg. Company did, on the 1st day of March, 1912, sell, assign and transfer unto the Kellar-Thomason Company all its right, title and interest in and to the said invention and unto the said letters patent, issued therefor, together with all rights of action, claims or demands arising out of or accruing from said letters patent in any manner whatsoever; and that your orator is now the sole and exclusive owner of said letters patent and of all rights thereunder.

IV.

That the said invention so set forth, described and claimed in and by the said letters patent No. 1,016,159 aforesaid is of great value and has been extensively practiced by your orator and that since the grant, issuance and delivery of the said letters patent, the said irrigating connections have gone into great and extensive use, and your orators have sold large [11] numbers thereof, and upon each and every one of the irrigating connections, so manufactured, used or sold by your orator, the word "patented," together with

the day and date of the issuance of said letters patent, to wit, 30th day of January, 1912, has been marked and stamped thereon thereby notifying the public of said letters patent; and the said defendant has been, long prior to the commencement of this suit, notified in writing of the grant, issuance and delivery of said letters patent No. 1,016,159, and of the rights of your orator thereunder, and demand has been made upon him to respect the said letters patent and not infringe thereon, but notwithstanding such notice, the defendant has continued to make, use and sell irrigating connections, embodying the said invention, as hereinafter more particularly set forth.

The patent No. 1,016,159 as aforesaid and referred to as a connection for irrigating device, is in fact a patent comprising and embracing the combination or the use of an annular flange as part of an irrigating valve or gate. Said annular flange being properly attached to the frame of said valve or gate and being of sufficient size to enable the user to place said flange over the end or at the end of a water or irrigating main and to leave a sufficient space between the inside of said flange and the outside of the end of said pipe to be filled with a cementitious filler, which cementitious filler serves the purpose of securely fastening or binding the water-gate or valve on or at the end of an irrigating pipe or water-main.

V.

And your orator further shows unto your Honors that the trade and public have generally respected

and acquiesced in the validity and scope of said letters patent No. 1,016,159, and the exclusive right of your orator therein and thereunder, and save and except for the infringement thereof by the defendant, as hereinafter set forth and your orators have had and enjoyed [12] the exclusive right, liberty and privilege since the 30th day of January, 1912, of manufacturing, using and selling the irrigating connection embodying and containing the invention described in, set forth and claimed in and by the said letters patent No. 1,016,159, and but for the wrongful and infringing acts of defendant as hereinafter set forth, your orator would now continue to enjoy the said exclusive rights and the same would be of great and incalculable benefit and advantage to your orator,

VI.

And your orator further shows that notwithstanding the premises, but well knowing the same, and without the license or consent of your orator, and in violation of said letters patent, and of your orator's rights thereunder, the defendant, the Snow Manufacturing Company has since the said 30th day of January, 1912, and within the year last past, and in the Southern District of California, to wit, in the county of Los Angeles, State of California, and elsewhere, manufactured and sold to others to be used, and is now making, using and selling to others to be used, irrigating water-valves or gates, provided with an annular flange, capable of being superimposed upon or so placed in connection with the end of water-mains or irrigating pipes, so as to provide

space for a cementitious filler and that said water-gates or valves as manufactured and sold by the defendant, were sold by the defendant, for the purpose of being so used in violation of the complainant's rights in the premises, and were so sold by the defendant knowing that the said gates or valves were to be so used in violation of complainant's rights and in infringement of the complainant's patent as aforesaid, and that said valves or gates as made by the defendant and sold by them, were made and sold with the intention that the same should be used by purchasers with a cementitious filler for attaching them to water-pipes and irrigating mains in a manner embodying [13] and embracing the complainant's patent and so intending that they should be so used in violation of the complainant's rights in the premises, and has infringed upon the exclusive rights secured to your orator by virtue of the said letters patent, and as set forth in the claim thereof which is numbered 1, and that the irrigating water-valves so made, used and sold by the defendant to be used were in violation of and are infringements upon said letters patent and each of said irrigating water-valves contains in it the said patented invention, and that although requested so to do, defendant refuses to cease and desist from the infringement aforesaid, and is now making, using and selling irrigating water-valves containing and embracing the said patented invention, and intends and threatens to continue so to do, and will continue so to do unless restrained and enjoined by this Court, and is realizing, as your orator is informed and believes, large gains, profits and ad-

vantages, the exact amount of which is not known to your orator, but upon information and belief your orator alleges the same to be the full sum of ten thousand (\$10,000) dollars, and your orator prays discovery of the said defendant, the exact number of irrigating water-valves made, used or sold by the defendant and the exact amount of profits and gains derived therefrom, by the defendant.

That for the wrongs and injuries herein complained of your orator has no plain, speedy or adequate remedy at law, and is without remedy save in a court of equity where matters of this kind are properly cognizable and relievable.

To the end, therefore, that the said defendant, may, if it can, show why your orator should not have the relief herein prayed, and may, according to the best and utmost of its knowledge, recollection, information and belief, but not under oath (an answer under oath being hereby expressly waived), [14] true, full direct and perfect answer make to all and singular the matters and things hereinbefore alleged, charged and set forth, and your orator prays that the said defendant may be enjoined and restrained, both provisionally and perpetually, from further infringement upon said letters patent and upon the invention set forth in said claim 1, and may be decreed to account for and pay unto your orator the profits and gains realized by defendant from and by reason of said infringement aforesaid, and the damages suffered by your orator by reason thereof, together with the costs and disbursements of this suit.

May it please your Honors to grant unto your

orator a Writ of Injunction, issuing out of and under the seal of this court, provisionally, and until the final hearing of this cause, enjoining and restraining the said Frank P. Snow and Frank S. Livingston, doing business as partners under the name of Snow Manufacturing Company, their agents, servants, employees, attorneys and assigns and each and every one of them from making, using and selling any irrigating water-valves containing or embracing the said invention patented in and by said letters patent and by said claim 1, thereof, and that upon the final hearing of this case said provisional injunction be made final and perpetual and that upon the final hearing of the case, a perpetual injunction be granted to your orator, and that your orator may have such other and further or different relief as to your Honors may seem proper and in accordance with equity and good conscience.

May it please your Honors to grant unto your orator the Writ of Subpoena of the United States, issuing out of and under the seal of this court, directed to the defendants, Frank P. Snow and Frank S. Livingston, doing business as partners [14½] under the name of Snow Manufacturing Company, commanding them by a certain day and under a certain penalty, to be and appear before this Honorable Court, then and there to answer this Bill of Complaint, and to stand to, abide by, and perform such other and further orders and decrees in the premises as to your Honors may seem fit.

And your orator will ever pray.

KELLAR-THOMASON COMPANY,

By ELMER O. THOMASON,

President.

GEO. A. MARTIN,

Solicitor for Complainant. [15]

United States of America,
Southern District of California,
Southern Division,—ss.
County of Los Angeles,
State of California,—ss.

E. O. Thomason, being first duly sworn, deposes and says: That he is the president of the Kellar-Thomason Company, the complainant in the above-entitled action; that he has read the foregoing Bill of Complaint and knows the contents thereof; that the same is true of his own knowledge, except as to such matters as are therein stated on information or belief, and as to such matters he believes it to be true.

(Signed) ELMER O. THOMASON,

President.

Subscribed and sworn to before me this 26th day of January, 1915.

[Notarial Seal]

(Signed) CHARLES C. MONTGOMERY,

Notary Public in and for the County of Los Angeles,
State of California.

[Endorsed]: No. B-65—Eqty. Dept. — In the United States District Court, Southern District of California, Southern Division. Kellar-Thomason Company, a Corporation, Plaintiff, vs. Frank P. Snow & Frank S. Livingston, Doing Business as

Partners Under the Name of Snow Mfg. Company,
Defendant. Bill of Complaint. Received Copy of
Within Complaint this —— day of Jan., 1915. ——
—— Attorney for Defendants. Filed Jan. 28, 1915.
Wm. M. Van Dyke, Clerk. By Chas. N. Williams,
Deputy Clerk. George C. Martin, Lawyer, Suite
908, Security Building, Los Angeles, Cal., Attorney
for Complainant. [16]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—B-65.

KELLAR-THOMASON COMPANY, a Corpora-
tion,

Complainant,

vs.

FRANK P. SNOW & FRANK S. LIVINGSTON,
Doing Business as Partners Under the Name
of SNOW MANUFACTURING CO.,
Defendants.

Answer.

THE ANSWER OF FRANK P. SNOW & FRANK
S. LIVINGSTON, DOING BUSINESS AS
PARTNERS UNDER THE NAME OF
SNOW MANUFACTURING CO., TO THE
BILL OF COMPLAINT OF KELLAR-
THOMASON COMPANY, A CORPORA-
TION, COMPLAINANT.

To the Honorable, the Judges of the District Court
of the United States, in and for the Ninth Cir-
cuit, Southern District of California, Southern
Division.

These defendants now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exceptions which can be had or taken to the manifold errors and uncertainties and other imperfections contained in the said bill of complaint, for answer thereto, or unto so much thereof as it is advised is material or necessary for it to make answer unto, answering says:

I.

Defendants deny that heretofore, to wit, prior to the 29th day of October, 1910, or any time prior thereto, George E. Kellar was the original, first and sole inventor of any new and useful irrigating connection; deny that the same was not known [17] or used by others, or patented or described in any printed publication in this or any foreign country before the alleged invention thereof by said George E. Kellar or that the same was not in public use or on sale in the United States for more than two years prior to the 29th day of October, 1910.

II.

Defendants admit that on October 29th, 1910, said George E. Kellar filed in the United States Patent Office an applicaiton, praying for the issuance to him of letters patent of the United States for an irrigating connection, but alleges that said application was falsely and fraudulently made and that the said George E. Kellar well knew, at the time of making said application and at the time said Geo. E. Kellar signed the specification forming a part of said application, and at the time said George E. Kellar made and swore to the oath forming a part of said application, that said alleged invention had been in

public use and had been on sale in the United States of America for more than two years prior to the date of making such oath and signing such specification, to wit, prior to October 29th, 1910; defendants admit that on January 30th, 1912, pretended letters patent of the United States No. 1,016,159, were issued and delivered to said George E. Kellar, but deny that said letters patent granted or secured to the said George E. Kellar, or his heirs or assigns, for the full term of seventeen (17) years from or after January 30th, 1912, or for any time whatever, the sole or exclusive or any right or liberty to make or use or to vend the said irrigating connection throughout the United States of America or the Territories thereof, or in any place whatever, and specifically deny that by the said pretended letters patent the alleged or any rights or privileges whatever were granted or secured to said George E. Kellar. [18]

III.

Defendants have no knowledge except as in said bill of complaint contained of the alleged assignments of the pretended invention and the pretended letters patent therefor, or the contents or scope of any such alleged assignments, and therefore require strict proof thereof as complainant may be advised.

IV.

Defendants deny that the subject matter of the said letters patent is of great or any other value or utility, but whether or not it has been extensively practiced by complainant or has gone into great or extensive use or has been sold in large numbers by the complainant, defendants have no knowledge and therefore require strict proof; defendants have no

knowledge except as in said bill or complaint contained whether or not the complainant has used or caused to be used upon any or all irrigating connections made by it, the word "patented" and the date of issuance of any letters patent and require such proof thereof as complainant may be advised; defendants deny that they have been notified in writing or otherwise of any rights of complainant as affecting these defendants under the said pleaded letters patent and deny that they have continued to or permitted others to continue to infringe any of the rights of the complainant alleged to be secured, to wit, by said pretended letters patent.

V.

Defendants deny that the trade or public have generally or at all respected or acquiesced in the validity and scope of the said letters patent 1,016,159 or the alleged exclusive or any right of complainant therein or thereunder; deny that complainant has had or enjoyed the exclusive right, liberty, and privilege since January 30th, 1912, or at any time of manufacturing, using and selling the irrigating connection embodying and containing the [19] alleged invention set forth and claimed in said pretended letters patent, either as alleged in said bill of complaint or otherwise or at all; deny that but for the alleged acts of this defendant, complainant would now continue to enjoy the alleged exclusive rights, and that the same would be of great or incalculable or any benefit or advantage to complainant.

VI.

Defendants deny that either in violation of said pretended letters patent or any right of the com-

plainant thereunder or otherwise or at all these defendants or any of them have within the last year past or at any time theretofore or there since, either in the Southern District of California, to wit, in the county of Los Angeles, State of California, or elsewhere made, used or sold to others to be used or are now making, using or selling to others to be used irrigating connections embodying, containing and embracing the alleged invention, described or claimed in said pretended letters patent 1,016,159, or embodying the construction as alleged of the irrigating connection, water-valve or gate; deny that any irrigating connections made, used or sold by these said defendants were or are an infringement upon said letters patent or contain in it the said alleged patented invention; deny that defendants have threatened so to do; deny that defendants are realizing any profits, gains or advantages whatsoever by reason of or rising out of any making, using or selling, or offer to sell or offer to make or offer to use any irrigating connections embodying, containing or embracing said alleged invention or as set forth in the claim 1 of said letters patent; deny that any act of these defendants have caused any damage, injury or loss to complainant or is depriving the complainant of any sums or profits whatever. [20]

VII.

Further answering defendants, upon information and belief say: that the letters patent 1,016,159 is invalid and void, because the thing patented or a substantial or material part thereof claimed therein as new, had long prior to the alleged invention of George E. Kellar, been patented or described or con-

tained in letters patent of the United States numbered as follows, to wit:

W. Hassall, 318,616.

T. & J. Galvin, 327, 945.

H. B. Nichols, 429,947.

H. H. Burritt, 515,514.

C. H. & E. H. Bentley, 827,409.

A. Wakefield, 608,239.

C. W. Seitz, 779,973.

P. F. Lyons, 852,515.

C. H. Moore, 879,399.

W. L. Jackson, 927,353.

H. E. Worley, 969,220.

J. H. Buttorff, 976,720.

W. B. Hughes, 1,000,173.

British Patent to Topham, 7442 of 1837.

And in prior publications as follows, to wit:

International Library of Technology, in the Los Angeles Public Library.

Vol. 72, copyright 1905, section 47, page 24, paragraph 48, and pages 44, 45, 46, 52 and 53, paragraphs 84, 85, 86, 87, 95 and 96, also in section 44, pages 9 and 10 and paragraphs 11, 12 and 13.

Vol. 98, copyright 1907, section 85, page 18, paragraph 22; also pages 33 and 34 and paragraphs 49 and 51 thereon. Also in section 88, pages 32 and 34 and paragraphs 32 and 35 thereon.

The catalogue of Crane Co. of Chicago, Ill., published at Chicago, and distributed among the branch houses of the Company and particularly, the Edition of 1902, pages 110, 111 and 118.

That in view of the state of the art at the time of the alleged invention of the said George E. Kellar and long before that time, the matters claimed in said letters patent 1,016,159, were not patentable inventions and were mere mechanical expedients requiring no invention and being within the domain of mere judgment and skill in the art; that the use of an annular flange attached to the frame of a valve or gate or other article to be connected with a pipe, such flange being of sufficient size to enable the user to [21] place said flange over the end or at the end of a water or irrigating main or any main or pipe so as to leave a sufficient space between the inside of said flange and the outside of the end of said pipe to be filled with a cementitious filler, which cementitious filler serves the purpose of securely fastening or binding the water-gate or valve or other article on or at the end of an irrigation pipe or water-main, or any pipe or main, as alleged in said bill of complaint was not a patentable invention and was merely a mechanical expedient requiring no invention and within the domain of mere judgment and skill in the art.

VIII.

Further answering these defendants, upon information and belief say: That said letters patent 1,016,159 is invalid and void because material and substantial parts of the things patented, and the said annular connection flange as alleged, has been used and known and were publically used and known by the following named persons, firms and corporations, and at the following places as set opposite their names, to wit:

Pomona Land & Water Co., at Pomona and elsewhere in Los Angeles County, California; C. K. Allen on his ranch at Lordsburg, California; Mr. A. W. Richards, at his ranch at Claremont, California; Mr. W. M. Baird, at his ranch at Olivet, Los Angeles County, California.

Further answering the defendants upon information and belief say: That the claim of the said letters patent is not a legitimate combination and is an aggregation and not patentable.

Further answering, defendants have good reason to believe and do believe, and therefore aver that the irrigating connection alleged by complainant to infringe the patent pleaded in said bill of complaint does not employ a circular or an annular flange as alleged capable of being superposed upon or so placed [22] in connection with the end of water-mains or irrigating pipes as to provide a curved or circular space for a cementitious filler, but upon information and belief avers that said alleged infringing irrigating connection is formed with an irregular, many sided, polygonal, angular flange or band, providing an irregular, many sided, polygonal, angular space around a water-main or pipe when applied thereto, whereby the cementitious or other filler, connecting means or binding agent used, obtains a stronger hold on the parts and more firmly and tenaciously binds the parts connected, together, than that afforded by the connection of the patent pleaded.

WHEREFORE, in view of the hereinbefore pleaded prior patents and prior public use, defend-

ants deny that they have infringed upon any exclusive rights secured to the complainant by virtue of said pleaded letters patent or that any attaching or connecting flange or other apparatus made by these defendants for use or sold by these defendants were or are infringements upon any rights secured to the complainant by said pretended letters patent.

That due proof of the aforesaid prior public use and certified copies of the above pleaded letters patents will be brought into court as your Honors may require.

WHEREFORE, defendants have fully answered complainant's said bill of complaint in so far as it is advised the same is material or necessary to be answered, deny that complainant is entitled to the relief prayed in said bill of complaint, or any part thereof, or any relief whatever, and prays to be hence dismissed with their reasonable costs and disbursements in this action taxed against the complainant.

CASELL SEVERANCE,

Solicitor and of Counsel for Defendants. [23]

[Endorsed]: No. Eq.—B-65. United States District Court, Southern District of California, Southern Division. Kellar-Thomason Company, Plaintiff, vs. Frank P. Snow, et al., Defendant, Answer. Received copy of within answer this 21st day of March, 1915. Geo. A. Martin, Attorney for Complainant. Filed Mar. 21, 1915. Wm. M. Van Dyke, Clerk. R. S. Zimmerman, Deputy. Cassell Severance, Patent Attorney, Suite 803, Security Building, Los Angeles, Cal., Solicitor for Defendants. [24]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—B-65.

KELLAR-THOMASON COMPANY, a Corpora-
tion,

Complainant,

vs.

FRANK P. SNOW and FRANK S. LIVING-
STON, Doing Business as Partners Under the
Name of SNOW MANUFACTURING CO.,

Defendants.

Stipulation Re Letters Patent.

It is hereby stipulated and agreed by and between
the parties to the above-entitled suit by their respec-
tive solicitors:

I.

That the title to the letters patent, set forth and
alleged in the Bill of Complaint, is in complainant,
as alleged in the Bill of Complaint.

II.

That uncertified copies of letters patent furnished
by the United States Patent Office may be offered in
evidence with the same force and effect as though
duly certified copies, subject to correction by the
production of certified copies, should any error be
found in any such copies and subject to any other
objections as to competency, irrelevancy or materi-
ality or admissibility under the pleadings. [25]

III.

That the recitals of all United States letters patent

setting forth the day and date upon which the specification or applications for such letters patent was or were filed in the United States Patent office shall be accepted as *prima facie* proof of such filing date or dates.

IV.

That enlarged drawings copied from Figs. 11 and 13, on pages 32 and 24 of §88 of Vol. 98 of International Library of Technology, and from Fig. 6 and 22 on pages 24 and 45 of §47, Vol. 72, of said work and a copy of descriptive matter relating thereto and submitted as schedule A be offered in evidence with the same force and effect as though the work named had been brought into court.

V.

That a ring taken from an irrigation stand-pipe in Pomona and which for convenience may be called "The Pomona Ring," has been in public use for more than two years prior to the alleged invention of George E. Kellar and more than two years prior to his application for the patent in suit and may be offered in evidence as defendants exhibit "The Pomona Ring" and as proven to have been in such public use and as representative of other devices of the same kind used in Pomona by the Pomona Land and Water Company and elsewhere.

CHARLES C. MONTGOMERY,

Solicitor for Complainant.

CASSELL SEVERANCE,

Solicitor for Defendants.

The foregoing Stipulation is hereby approved and it is ordered accordingly.

District Judge. [26]

[Endorsed]: B-65—Eq. Kellar-Thomason Co., vs. Frank P. Snow et al. Stipulation as to Letters Patent & ct. Filed May 17, 1916. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. G. [27]

United States District Court, Southern District of California, Southern Division.

No. B-65—IN EQUITY.

KELLAR-THOMASON COMPANY, a Corporation,
Complainant,

vs.

FRANK P. SNOW & FRANK S. LIVINGSTON,
Doing Business as Partners Under the Name
of SNOW MANUFACTURING CO.,
Defendants.

Interlocutory Decree Sustaining Patent.

This cause having come on to be heard, upon the pleadings, proceedings and proofs herein filed on behalf of both parties, and after hearing Charles C. Montgomery, counsel for complainant, and Cassell Severance, Esq., counsel for defendants, and after due proceedings had, upon consideration, on motion of Charles C. Montgomery, Esq., solicitor and counsel for complainant, and due deliberation had, it is hereby

ORDERED, ADJUDGED and DECREED, as follows:

FIRST. That the letters patent of the United States of America, issued to George E. Kellar, assignor to Kellar-Thomason Manufacturing Company, his assignee, on the 30th day of January, 1912, for new and useful improvements in irrigating connections, No. 1,016,159 and assigned to the complainant Kellar-Thomason Company, a corporation, are good and valid in law, the claim of which is as follows:

“A gate having a plate with an opening through which water may flow, a pipe having its end abutting against said plate adjacent to said opening, said plate having an outwardly projecting flange, encircling the end of said pipe and forming an annular space between the end of said pipe and said flange, and a cementitious filler in said annular space securing said plate to said pipe.” [28]

SECOND. That the said George E. Kellar was the first true and original inventor of the invention and improvement described and claimed in said letters patent, and particularly recited in the claim thereof.

THIRD. That the complainant the Kellar-Thomason Company, a corporation duly organized and existing under and by virtue of the laws of the State of California, and having its principal place of business in the city of Los Angeles, county of Los Angeles, State of California, is the lawful owner of said letters patent, and is entitled to the exclusive rights in, to and under said letters patent, and in and to the invention and improvements secured thereby.

FOURTH. That the defendants Frank P. Snow and Frank S. Livingston, doing business as partners under the name of Snow Manufacturing Company, have infringed upon said letters patent, and the claim thereof, and upon the exclusive rights of the complainant under same, by manufacturing, using and vending to others to be used, irrigating connections, containing and embodying the improvements described in said letters patent and particularly claimed in the claim thereof.

FIFTH. That the complainant do recover of the defendants and each of them, the profits, gains, savings and advantages which the said defendants have derived, received or made since January 30th, 1912, by reason of the infringement of the exclusive rights under said letters patent, by any manufacture, use or sale, or inducement to any or either of said acts, of irrigating connections, containing and embodying the improvements described in said letters patent and claimed in the claim thereof, and that complainant do recover of said defendants and each of them any and all damages which the complainant has sustained since said date by reason of such infringement of its exclusive rights, by said defendants. [29]

SIXTH. And it is hereby referred to Force Parker, Esq., a Master of this court, who is hereby appointed to take, ascertain and state the number of infringing devices or parts thereof made, and the number sold by the said defendants in infringement of the claim of said letters patent, and the number of such infringing devices or parts thereof which the said defendants have on hand, and the gains, profits,

savings and advantages derived by the said defendants from and through said infringement, and to assess the damages thereby suffered by the said complainant and to report thereon to this court with all convenient speed.

And the said defendants, their officers, agents attorneys, clerks, servants, workmen, and employees are hereby directed and required to attend before the said Master from time to time as required by him, and to produce before him such books, papers, statements, exhibits, vouchers and documents as they may be directed by said Master to produce, and to submit to such oral or other examination as the Master may direct.

SEVENTH. That a perpetual injunction issue out of and under the seal of this court, directed to said defendants Frank P. Snow and Frank S. Livingston, doing business as partners under the name of Snow Manufacturing Company, its associates, officers, agents, attorneys, clerks, servants, workmen and employees, enjoining and restraining them and each of them from directly or indirectly making or causing to be made, using or causing to be used, advertising for sale, vending or causing to be sold in any manner, any articles, devices or parts thereof containing and employing or embodying the said invention and improvements described in said letters patent, No. 1,016,159, and claimed in the claim thereof and from counterfeiting or imitating the said invention and improvements or any part or parts thereof in any way, or from infringing upon or violating the said letters patent in any way whatsoever. [30]

EIGHTH. That the complainant do recover of the defendants and each of them, the costs charges, and disbursements of this suit to be taxed, and that the question of increase of damages and all further questions be reserved until the coming in of the Master's report.

WM. C. VAN FLEET,
United States District Judge.

O. K. as to form.

CASSELL SEVERANCE.

May 25, 1916.

Decree entered and recorded May 25, 1916.

WM. M. VAN DYKE,
Clerk.

By T. F. Green,
Deputy Clerk.

[Endorsed]: No. B-65. In Equity. In the United States District Court, Southern District of California, Southern Division. Kellar-Thomason Company, a Corporation, Plaintiff, vs. Frank P. Snow and Frank S. Livingston, et al., Defendant. Interlocutory Decree Sustaining Patent. Received Copy of the Within Interlocutory Decree this 24th Day of May, 1916. Cassell Severance, Attorney for Defendants. Filed May 25, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk. C. C. Montgomery, Lawyer, Suite 908 Security Building, Los Angeles, Cal., Attorney for Plaintiff. [31]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—No. B-65.

KELLAR-THOMASON COMPANY,

Plaintiff,

vs.

FRANK P. SNOW et al.,

Defendants.

Statement of Evidence Under Equity Rule 75.

Plaintiff offered in evidence copy of letters patent No. 1,016,159, dated January 30, 1912, as "Plaintiff's Exhibit 1."

It was stipulated that plaintiff was and is a corporation as alleged in the Bill of Complaint and that defendants Frank P. Snow and Frank S. Livingston were and are partners under the name Snow Manufacturing Company, doing business at Los Angeles, California.

Testimony of George E. Kellar, for Plaintiff.

GEORGE E. KELLAR, called on behalf of plaintiff, duly sworn, testifies:

"I am 38 years of age, reside in Covina, Cal., and a manufacturer of irrigation appliances for sixteen years past; I am the inventor named in 'Plaintiff's Exhibit 1.'

I began in the manufacture of concrete pipe in 1898 or 9, and that was for conducting water on my ranch, and at that time, there were very crude methods that I knew of for the controlling of water, and in dis-

(Testimony of George E. Kellar.)

tributing the water upon the land, so I began to see what I could do towards developing something to control the flow of water, and I have made [32] different devices, and from time to time, and at last, I developed something that I felt like was worth patenting, and made application and secured one patent as referred to here, and one we have before us. And in the construction of irrigation systems, I had a good deal of experience in the method of installing appliances for the control of water, and when I found something that did not answer the purpose, I would work on the device until I got something that would work; and all these years I have been studying and experimenting in different ways along that line.

When I took up the manufacture of gate-valves, the art of irrigation was in its primitive state with reference to concrete pipe conduits; for the control of water we had nothing but the screw gate and wooden caps and things like that for the control of water. We had for the delivery box * *. * we had screw gates, and for the outlets from the stand-pipes we had wooden caps * * * things like that was all that was in use at that time. Cement pipe or vitrified pipe had been used in place of open ditches in irrigation for perhaps eight or ten years, but we had nothing to convey the water, without reference to the distribution. It was the distribution that I was working with that caused me to develop what I have. I first devised a valve for the control of the flow of water through the stand-pipe, and also a gate with a slide and it was clamped on a frame to

(Testimony of George E. Kellar.)

control the water in the main conduit. That was first merely installed on the inside of a cut-off pipe or box, and without any flange. The first gate I made was without any flange. There was a demand for something to secure these gates to the end of the pipe. Many times the latter ended at a street, and it was desired—or at an arroyo, or ravine or something like that where they wanted to drain out the pipe. [33] Drain out the pipe, get it clear of sand, debris, or anything like that, or in winter time it was necessary to clear the pipe of water so it would not freeze, if it was used in cold countries, and there was nothing then, excepting putting up a box or concrete pipe vertically, and putting in the gate we had in use then, but I conceived the idea of attaching that gate by means of flange and this cementitious filler.

I placed the flange, to begin with, on the outside. I had no previous device where the flange was on the inside. I have read and understood the patent in suit No. 1,016,159. I knew the value of cement as a means of holding the two parts together, and I knew that by putting in—filling this space between the flange and pipe with this cementitious filler * * * I could hold the gate in place. That will hold to secure this flange to the end of the pipe. Now, that is the essence of the invention as I understand it, as I had in mind, was to get something that would secure this gate by means of the flange to the pipe, and the cement has such sticking qualities when it is in proper consistency to hold the two parts together, and cement will stick to concrete, and it will always

(Testimony of George E. Kellar.)

stick to iron or steel, so the holding properties was what I was after in that cementitious filler.

I have examined and understand the construction and operation of the devices manufactured by the plaintiff. The Complainant's Exhibit 2, a metal device, 'Complainant's Commercial Device' embodies the features of the patent in suit. In this we have cast the flange integral with the valve seat or frame or arch, as we *all* in common practice, which ends at right angles with this seat, so it would telescope the end of the pipe upon which it is to be secured, and by filling the space between the pipe that is inserted in [34] the valve and the valve, we secured the valve in place.

We make these in even sizes, from six inches to twenty-four inches; that is, the opening in the valve; the smallest is six inches and the largest is twenty-four. We make about a dozen sizes; in all these sizes the space between the pipe and the flange is practically the same. (We don't gauge the space in accordance with the size of the flange.) All we need is just enough to put in the cementitious filler.

(A device is produced marked Complainant's Exhibit, 'Defendant's Commercial Device' Exhibit 3, and it is stipulated that this device was manufactured and sold by defendant subsequent to the grant of the patent in suit). Referring to exhibit 3, the witness says:

As I see it, its construction was practically the same, it having a valve seat or frame upon which is a flange constructed of various sides, or octagonal, but

(Testimony of George E. Kellar.)

it is—its function is the same as the circular flange, and the means of attaching it to the stand-pipe is the same as with the circular flange, a cementitious filler is required, and the same characteristic of a cement is the same in each case.

Previous to my invention, we ourselves had no means of attaching a gate or valve to the end of the pipe on the outside. We did not attach it in that way at all, except by putting up a stand-pipe * * * a vertical pipe at the end of the pipe, and putting in the gate, which has the same function with reference to closing of the lateral as this does. It is just cemented into the opening of the vertical pipe; if we had tried to use our valve on the end of a pipe, we should have to use anchor bolts; that is, I mean the valve that we were manufacturing before we invented the flange. [35]

We notified the Snow Manufacturing Company to cease infringing our device. As I recall it, it was in the Spring of 1914 I requested them to quit manufacturing, which they promised to do. At that time the only difference between the valve they were manufacturing and exhibit 3 was it had a circular flange instead of an octagonal; we employ about fifty men, have employed more when business was better. We have about an acre and a half in factory site. The manufacture of the device in question is one of our main lines. Our best year, I believe, was in 1913, when we put out ten or fifteen thousand of them, which represents something like \$40,000 to \$50,000; these valves were used for controlling the flow of

(Testimony of George E. Kellar.)

water through the stand-pipes on alfalfa or grain irrigation, or where flooding is necessary, where a large quantity of water is required in any one place; in some orchards where the ground is sand like in the walnut section of this country, they do use this valve in that irrigation.

Exhibit 2, Complainant's Commercial Device and exhibit 3, Defendant's Commercial Device received in evidence.

On cross-examination, Mr. Kellar testifies:

The Complainant's Exhibit 2 is not exactly like the drawings of the patent in suit; the device disclosed in the patent being intended for closing off the end of the line; the one in the exhibit being primarily intended to be applied to the end of a stand-pipe. Both could be used either way. The one illustrated in the patent does not move in the same direction as the commercial device.

We didn't specify in the patent any way of applying the cement.

The flange employed by plaintiff is different from other bell flanges in use to secure articles to pipes. It is merely a straight flange without any grooves or lugs, or anything to assist the cement to hold other *that* its consistency. [36]

On redirect examination: Our term "gate" is distinguished from the valve in that the gate is used in a vertical position while the valve is horizontal. The gate is used to cut off the flow of the water through the main conduit underground, while the valve is used to close the water off from flowing out

(Testimony of George E. Kellar.)

through a stand-pipe; they could be reversed except as a matter of convenience; a gate could be put on top of the stand-pipe and a valve on the pipe as it lay horizontal. It has been done both ways on this work. If this valve was placed on the end of a pipe and had to be operated from the surface, this pipe being a horizontal pipe, all being under ground, it would be inconvenient to operate this valve. [37]

The patent covers merely the flange that is attached, it may be either a gate or a valve; it covers either a valve or a gate. It is my understanding that the patent merely covers the means of attaching a valve or gate to the end of a pipe. The other elements there were no novelty in. The only novelty we claim in the combination is the cementitious filler, together with the flange, the flange and cementitious filler and that flange may be on either a gate or a valve.

It was stipulated that the illustration of the gate is of one complainant's are manufacturing now in place of the one like that shown in the patent. The illustration from the catalog was marked exhibit "4" and offered in evidence.

The WITNESS.—This is a flange cast on the back of the gate, or it may be riveted to the back of the gate, and it circles the end of the pipe, and the annular space is filled with the cementitious filler.

The defendant Snow worked for our company as pattern maker and draftsman, beginning in 1909, I believe, and worked until the latter part of 1911 or forepart of 1912, as I remember, when we were manu-

(Testimony of George E. Kellar.)

facturing our present commercial device covered by our patent.

Recross-examination.

Prior to conceiving the invention I knew of the use of the bell and spigot type of connection with a cementitious filler.

Testimony of Elmer O. Thomason, for Plaintiff.

ELMER O. THOMASON, called on behalf of plaintiff, testifies:

“I am a manufacturer and orange grower, forty-nine years of age, living at Covina, Cal.

I was engaged for a number of years in the manufacture and installation of concrete pipe for irrigation purposes; [38] I have set a great many of these valves in place, and other kinds of valves, and other kinds of gates, or gate valves. I have had a good deal of experience in the manufacture—quite a number of the articles manufactured by the Kellar-Thomason Company, were my inventions; some of them were; not this one.

Well, we have had a good many inventions and obtained patents on a large number of them I think some seventeen. I have had a good deal of experience in talking with patent solicitors and attorneys, and naturally I have learned considerable about it.

I have read and understand the patent in suit. The essential feature in this patent is the flange as the means of connecting the valve or gate. I think in this case it is what we term a “gate,” but there is no essential difference between a valve and gate, ex-

(Testimony of Elmer O. Thomason.)

cept as has been explained. The essential feature in this patent is the flange as the means of attaching the valve or gate to the end of a concrete pipe, or other kind of pipe; it might be vitrified,—the flange allowing the annular space between the end of the pipe and the inside of this flange to be filled with a cementitious filler.

Prior to the time that we used this, they were securing valves and gates by means of clamps, a band clamped around the outside of the pipe with a bolt running from the gate to the band. Anchor bolts and bolts—clamps and bolts and anchor bolts, and such things as that was the usual means of securing a valve or gate to the end of a pipe when it was put directly on the end of the pipe. Now, sometimes a valve or gate was placed down in a concrete box, and in such an instance as that, it would be secured a good deal the same as you would secure a pane of glass in a window, by putting putty around it; that is when there was an abutment of soil it could be placed against, but we needed this means of securing this directly to the end of a pipe where there were no [39] *no* such means of securing it. Now, in such cases as that, prior to this invention they used clamps and bolts to do it with; they used a little cement to prevent leakage, but this invention was the first use of this kind for securing gates and valves to the end of the pipe, so far as I have ever seen or heard of; prior to this invention, it was well known to secure the joints or pipes together by babbitted metal or other fillers. These joints were not end joints.

(Testimony of Elmer O. Thomason.)

When an end joint was used, that babbitt was merely to caulk the joints, sometimes they used oakum or such things as that.

When we first devised this plan of securing a valve to the end of a pipe, we offered it for sale to a man engaged in pipe making. He said, "That won't stay on"; it would be blown off by pressure; he said, "That cement will not adhere to it; that infinitesimal amount of shrinkage will not let it go on." I suggested it to one of the best cement men here in Los Angeles; he is here now; you would know him. He said, "You can't secure it in that way." I said, "I want to demonstrate that to you." I did. And he was surprised to find an iron valve could be secured to the end of a cement pipe without any anchors or bolts or clamps, or anything of that sort. We found that none of the men engaged in the use of cement—engaged in the manufacture of pipe that believed this could be done; I have had numbers of them tell me it couldn't be done; the discovery was made rather accidentally.

I went up to Colorado to the Irrigation Congress in 1909, and I saw a number of gates there secured to the end of a pipe, but in every instance they were secured by anchors or clamps, generally by a collar clamped around the pipe, and then the bolt running from the collar to the gate at the end of the pipe, and I came home and said to Mr. Kellar, "We need some better means of fastening a gate to the end of a pipe." And we were talking over a number of things and while we were [40] talking, it just

(Testimony of Elmer O. Thomason.)

seemed to come as an inspiration. He said, "Well, we will put a flange on the back of the gate," and as soon as he mentioned it I said, "Certainly, that is the thing to do." And we knew the possibility of that by this: That we knew that iron and cement expand and contract together; that is the reason that it is possible to have reinforced concrete; they expand and contract together. One not knowing that would have supposed that the iron would have become heated and would crack away from it; in many cases I know that the pipe joints were furrowed with some sort of an instrument or the material was plastic so as to give the cement a chance to get hold of it; I don't know it was in all cases. An instrument of some kind had been run around it to make a number of furrows in the ends of the pipes to make a roughness so the cement could get hold of it. I have seen water pipe with a bell end and a spigot end put together and cemented around, but they were always laid on the ground and held by the earth, or if at the end of the line always anchored by earth behind it, or concrete or rock, or something behind it, so there was no chance for it to go off; I have never seen it used in this manner.

Many years prior to this invention I knew of clay water-pipes filled with cement between the flange and the end of the other pipe; before this invention the alfalfa valves were constructed differently; there was no flange here, the bead or the seat of the valve was on edge. The lower edge of that went down into the bevel end of a concrete pipe, and a little cement

(Testimony of Elmer O. Thomason.)

was put around it, but they gave a good deal of trouble. It would blow off, so that an anchor bolt in the shape of an "S" would be fastened to this arch, and this attached to the side of the pipe down below cemented in to hold it in place; prior to this invention there was nothing, so far as anything [41] previously used was concerned that suggested to me as a practical manufacturer that this flange could be put on the outside, encircling the end of the pipe, with an annular space between, and held there by a cementitious filler. We had never seen anything like this up to the time we used it. There was a demand for such a thing.

It was necessary to have some means of closing the pipe end of a stand-pipe in a field to shut the water off, and then it could be used to open it to let it flow again, and we used the other kinds of valves I have just described, but it gave a great deal of trouble, in being forced off by water pressure, in being on end in that manner, so there was a good deal of demand.

These valves will stand more than the ordinary concrete pipe will stand or clay pipe. Perhaps ordinarily they are called upon to stand five or six pounds to the square inch, ten or twelve feet pressure, but we have known them to be used under much greater pressure than that, but never heard of one being blown off. Concrete men have told me you can't get them off without breaking the pipe.

The use of this invention grew pretty rapidly. I think half of our business has been in this kind of valve, or using this flange; perhaps \$50,000 worth a year.

(Testimony of Elmer O. Thomason.)

The advantage in putting a flange on the outside of the pipe over that of putting it on the inside of the pipe is, you can have the opening the full size of the channel through the pipe so you don't cut down the capacity of your pipe. Prior to the use of this we had to get on the inside of the pipe so that our opening was smaller than the opening of the pipe. This cut down the discharge, perhaps half an inch on an eight inch pipe. [42]

The function that a stand-pipe performs in irrigation is that of a hydrant. The horizontal line runs along, perhaps, a foot underground; that is the top of it, and then there is a stand-pipe, which is a short section generally coming up.

After the invention we began the manufacture of the device in its first form, we manufactured it right away; I think it was in—well, you asked me how long—pretty soon.

On cross-examination, the witness stated: "The concrete pipe was made, of course, first, and there was an established bevel that was in common use, which couldn't very well be changed; that was not very deep. It was rather shallow. The valve that we made before this had to set down in that beveled end of the pipe. There was not much space there—that is, to get much of a hold on this valve—or hold on this valve, and without going to work and changing the whole construction of concrete pipe, you couldn't improve that, except by getting on the outside rather than on the inside. The cement engaged in the shallow beveled end of the pipe, and the lower

(Testimony of Elmer O. Thomason.)

end of this valve. The device had no external flange at the periphery, that is, no flange to go outside of the pipe; the chief difference then in the prior device was the providing of an outside pipe including flange on the frame of our valve, otherwise they were the same. They were made sufficiently large to form an annular space to receive a cementitious filler. The flange in that device was similiar in function to the flange of the ordinary bell and spigot joint on the pipe, either tile or iron the difference in this, that it was used to cement—to secure a valve to the end of a pipe, not in a continuous line, it formed the annular space around the end of the pipe, just the same, and the cementitious filler was used between the two identically the same way; the function of this is to secure the valve to the end of the pipe and to make a water-tight joint. The length [43] or degree of flange is a matter of judgment. In some cases the depth is greater than others. It was a matter of experiment when we started in with this width of flange. We did not need any other securing means beyond cement. I have known them to try to take them off, and in every case they either had to break the valve or break the pipe to get them off; they always stayed.

On Redirect Examination.

A number of concrete pipe makers did use an “S” anchor rod attaching on the bottom of this arch, and the other end of it being secured in the inside of the pipe down perhaps a foot or so. I never used such anchor rods. I always set them very

(Testimony of Elmer O. Thomason.)

carefully and covered up the stand-pipe with a wet sack or wet earth, and by being very careful I was successful generally in getting them to stay on, but there was a common complaint that they would blow off. We took great care to set them in the old way. We buried the ring in the cement filler when it was put on the inside of the old type of valve; we put it down into the beveled end of the flared end of the pipe, and with the little cement as I have described it, like it was in glass. There was no room for very much. There was just such a slight raise on the outside of the flange. It was to give us a little better chance to secure it to the end of the pipe. There was no bead on the outer flange, none on this at all. This really—this has a little bit of flare to it. The flare is merely to enable the moulder in the foundry to draw it out of the sand. The flare on the outer flange has this effect on the ease and cheapness of manufacture, we don't have to use any core, only just the green sand proposition.

Recross-examination.

The cement joint between our gate and the pipe is [44] found to prevent blowing off and holding heavy pressures. I think the same power to hold pressures would result from the ordinary bell and spigot joint, but no one knew it until we discovered it. The fact is that the ordinary bell and spigot joint is not called for the purpose, to do that. It is laid on the ground in a manner that if it should fall apart, it should have to pull the pipe through the earth, while the skin friction of the earth is suf-

(Testimony of Elmer O. Thomason.)

ficient to prevent that. Now, if there is an end joint, that is always anchored with earth or rock or cement; in laying our pipe-lines—the end joint, we always provided an abutment there for it to come against, so that function was never performed in the bell and spigot pipe joint; it doesn't come on the end as this does; it is in the line; it couldn't get out if it wanted to. The cement in that case merely serves to make it water-tight. The earth is sufficient to hold it.

A flange like this will, if filled with cement around the end of a pipe, will hold it there, without roughening, or other means, without anything else at all.

A have never seen an iron pipe with a bell end receive the spigot end of another pipe filled in with cement.

Redirect Examination.

There is no advantage in defendant's device there by reason of its having many sides. That wouldn't help it any. This is sufficient. I never knew one of these to blow off; it never needs anything more than just that.

Testimony of Ernest L. Rogers, for Plaintiff.

ERNEST L. ROGERS, witness produced on behalf of plaintiff, testifies:

I am a resident of Los Angeles, a clerk in the employ of plaintiff, and in the early part of 1914, bought the alfalfa [45] valve marked exhibit 5 from the defendants for \$2.14. This was manufactured by the defendants.

(Exhibit 5 offered in evidence.)

Testimony of George C. Martin, for Plaintiff.

GEORGE C. MARTIN, called on behalf of plaintiff, testifies:

“I am forty years of age; reside in Manhattan Beach, a suburb or town adjacent to Los Angeles; at the present time I am manager for Kellar-Thomason Company; prior thereto, since 1899, I practiced law; most of which time was spent in the practice of patent law, or a great deal of my time; that is, I never tried any patent case alone; I took part in the trial of cases and have several cases pending in this court; gave opinions on patents; acted as counsel in patent cases here and elsewhere, and devoted myself to the study of patent law to a very considerable extent; I have invented a number of devices, and I expect that is what started me in the study of patents. I have counselled with Mr. Severance in many cases, or he counselled with me.

I have studied the patent in suit; the claim covers a gate having an opening through which water may flow, a pipe having its end abutting against said plate, adjacent to said opening, said plate having an outwardly projecting flange encircling the end of said pipe and forming an annular space between the end of said pipe and said flange, and a cementitious filler securing said plate to said pipe. The patent elsewhere states that it refers to attachments for the ends of pipe, and for regulation of water flow; both gates and valves. As I understand this patent it is a combination of a flange [46] and pipe end and opening, and means of closing the opening,

(Testimony of George C. Martin.)

and the cementitious filler between the flange and the outside end of a pipe, regardless of whether the remaining parts providing the closure is there, are for what is known as a lid valve, or a slide to the gate, the only difference being one is usually opened and closed with a lid, described so because its motion is to and from the seat, so-called, and a slide, whose motion is at right angles to the opening; that is arranged simply for a matter of convenience. The patent therefore simply covers the combination of a cementitious filler with a flange and the end of a pipe and the opening, and a convenient means of closing it. In other words, it has a means for attaching, and this cementitious substance has a means for attaching the valve and a gate where one—where the gate or valve ends the line.

I have heard the other testimony, and I have examined of course the prior art. I know how cement pipes and vitrified pipes and steel pipes have for many years been fastened together with hemp, with lead pounded in cold or poured in hot, with tar, and with asphaltum; with any other substance which could be used by being forced into a caulk joint. I have seen pipes laid that have been placed for many hundred—several thousand years, in fact, with what I presume was cement, called plaster, although I think the early people knew how to make cement.

Cement itself is not new as a means of forming a closure between a bell and a spigot end in a pipe. The newness in this invention resides in the fact

(Testimony of George C. Martin.)

that there is one element lacking here, as compared with the elements found in a pipe-line; that is, there is—where two pipes are laid together, or where a number of pipes are laid together, their disposition is to remain in place. The force of water driven through those pipes will never have any effect to move one longitudinally relative [47] to the other, unless the end is closed up. In the use for which this patent is provided, the disposition of the water or of the pressure of the water is to force the two elements apart. The cement in here, it was discovered, had the effect of not only making a water-tight joint, as in the case in vitrified or clay pipe, but it also has the additional effect or property of holding the valve or gate against other high pressures. I have known of a gate like this holding a pressure of 2500 pounds without being blown off; that is a maximum pressure on the end of the pipe, a pressure of 2500 pounds.

Now, in all reinforced concrete work, it has been discovered that concrete has the characteristic of adhering to iron. Now, that property, to understand, for instance, of we were taking pieces of cement and plaster it against this iron and let it stay, it will stick there just like glue; you have got to chip it off. You can't pull it off, so there is an adhesion there besides that roughness of surface; there is some affinity between the two; the two expand and contract together; under the exposure of heat or cold. Of course, if that were the case, they would break apart if heated. In the art, in one of the *case* cited by

(Testimony of George C. Martin.)

Mr. Severance, where cement was used or shown as a filler in connection with some other things, with the bead appearing on that pipe, the patentee in that case stated it would make a water-tight joint and would be good for practical use, where it was not exposed to any pressure. It was not conceived by people that cement would make a joint which could withstand pressure. I don't remember that patent, but I have been studying it; it was one of your citations.

I have examined and understand the construction and operation of irrigating connections manufactured and sold by plaintiff.

Referring to the patent in suit, I find in the patent [48] the elements in the claim are as follows: A gate having a plate with an opening through which the water may flow. In the art of irrigation appliances it sometimes requires a little practice to distinguish between a gate and a valve, the distinction usually being, as I explained this morning, is this, that the valve is one where the lid lifts up and down and the gate where the lid slides. Their uses, however, are analogous, except for a matter of convenience. Usually the gate has a handle and the valve is screwed by either nut or a bolt, with a tee in place of that nut. I have before me the exhibit which you describe, which is described in the commercial business as a valve. And that valve, the part which *is* described in the claim of the patent as the plate, is the part between the inner flange on the top of the valve and the outer flange

(Testimony of George C. Martin.)

on the bottom of the valve. The opening through which water may flow is the opening which is normally closed by the lid when the lid is shut, and may be opened, and is an opening in the plate through which water may flow.

I might say, it may be noticed on this alfalfa valve there is an outside flange here, or a rim that is used as a seat for what is called a hydrant, which has a sort of tin reservoir bolted down on the head by bolts which come under the flange—the lower flange of the valve. Then that hydrant—that tin cylindrical device has a little spout, to which is attached a spout of any convenient length so a man may irrigate from a surface flow. I have before me a piece of pipe, but the claim of the patent refers to a pipe as an ordinary cement, vitreous—vitrified clay or an iron pipe. They are all used in the art, but particularly the cement pipe, the cement pipe having an end abutting against said plate. That would mean [49] having an end in here against the plate. (Indicating.) This is the bottom side of the plate on this side adjacent to said opening. In fact, it is usually put on so that the opening in the pipe is concentric with the opening of the valve, said plate having an outwardly projecting flange encircling the edge of said pipe and forming an annular space between the end of said pipe and said flange, so that when the pipe is set in here, there is a space—an annular space, as it is described, between the end of the pipe and the flange.

The claim also recites “and said flange has be-

(Testimony of George C. Martin.)

tween the pipe and the flange a cementitious filler, in said annular space securing said plate to said pipe.” Of course, the cementitious filler secures this plate, because it secures the flange. The patent claim describes particularly a gate, although, I think, as I said before, it refers to both a gate and the valve, so that I find in this commercial device, a plate, a flange, and in use would find, although I haven’t it here before me in this exhibit, a pipe which fitted into the end of the valve, would encircle the opening and would leave an annular space between the flange and the outside diameter of the pipe, and there would be then a place which would in practice be filled with a cementitious filler, which by adhesion to the pipe and to the flange would hold the plate and the valve, or the gate, or whatever it might be, in place.

Referring to exhibit 4: This device, which I have, and which I understand is described as device made by defendant in the first place, not defendant’s present commercial device, has the same elements as described in the claim, and which existed in plaintiff’s commercial device; that is a plate—an opening through the plate through which water may flow, a flange, a means—or a lid or a closing device [50] and place for a cement pipe, or some other kind of a pipe inside of the flange and encircling the opening, and leaving the annular space between the end of the pipe and the flange to be filled with a cementitious filler for the purpose of holding the plate, and hence the other parts of the gate on the valve.

(Testimony of George C. Martin.)

This gate is a little different in its construction from complainant's device, inasmuch as this is what is described in business as an over-arch, the arch in this case being outside of the water; in complainant's device, the arch is an under-arch, being inside—it serves the same purpose; the complainant makes an over-arch valve, which is the same as this; *if* effect they are both alike in effect.

Referring to exhibit 3, the device you describe is exactly the same as the device just described, having all of the elements of the former device operating in the same manner, provided with means for attaching to the cement pipe in the same manner, except that in the former case the flange is circular, and in this case it has eleven sides; the general contour of the flange is circular and would leave an annular space between the outside of the pipe, and is adapted to leave that space to be filled with a cementitious filler.

I find that the claim of the patent in suit comprises, as stated before, a gate having a plate with an opening through which water may flow. This is the plate. (Indicating.) And in the center is the opening through which water may flow; a pipe having its end abutting against said plate. In practice, although it is not shown in this device, cement or other pipe would abut against this plate on the bottom side; that is the only way it can be used. Adjacent to said opening—and it would be adjacent or concentric with said opening—said plate

(Testimony of George C. Martin.)

having an outwardly projecting flange encircling the end of the [51] said pipe and forming an annular space between the end of said pipe and said flange, this gate is provided in that respect with the same identical means as the commercial device of the complainant, and leaves, as I stated of our patent, a cementitious filler in said annular space securing said plate to said pipe. In use this gate is set over the end of the pipe, leaving an annular space between the end of the pipe and the flange, which is filled with a cementitious filler, which causes the gate to adhere to the end of the pipe fastened there against pressure and against leakage, and those are all of the elements of the patent in suit and they are all embodied in "Defendant's Commercial Device"; there is no advantage in "Defendant's Commercial Device," so far as it fulfills the claims of the patent in suit over plaintiff's device; they both operate in the same way; they are held on by the same laws, by the same action of the cement; the fact that there are eleven sides does not give it any greater adhesive power; it does not affect that in any degree at all, so far as I know; it may possibly weaken the structure because it is a known fact that a circle is stronger than a polygonal form, but there is no difference; in fact, so far as I know, both will hold equally well; both will hold sufficiently tight to accomplish all the needs of the irrigator.

It should be understood that when farmers and ranchers commenced to irrigate by underground

(Testimony of George C. Martin.)

pipe systems, there grew a need for some devices which had never before existed in any art. Hydrants and water distributing means were quite old, but were expensive. For instance, this valve, which weighs, say, 22 pounds now sells for about \$5. That, to the consumer [52] the requirement was for a cheap appliance, easy to attach, which did not require a plumber nor an expert to fasten onto a system, and which at the same time would enable the rancher to control the flow of water. The rancher had, in the first place, his pipe. The first efforts which were made with steel pipes, or sheet steel pipes, or cast iron pipes for the reason that when this art first developed, cement pipes were practically unknown. Vitrified pipes never came into general use, except in centers where they could be manufactured economically. They can't be shipped very far on account of the freight. Cement pipes can be made anywhere where cement can be purchased, and the principle item of the expense is the labor. Cement, sand and gravel, and water are the parts used, but in the steel pipes one of the very first evidences of development was this practice. Three or four holes were drilled into the steel pipe. Eye-bolts, or ears, or lugs were either screwed or rivetted into those holes, a gate was pushed up against the end of the pipe, and then bolts were run through the gate or the valve, and through those holes in the lugs, and in that way, the valve or gate was drawn up tight against the end of the pipe. Then, in order to make it water-proof, cement was

(Testimony of George C. Martin.)

packed around to hold the gate or valve in place. Another means was to put a clamp, which by means of a bolt, could be tightened around the pipe, and the valve and gate was bolted to that clamp in the same manner. Another means was to use an ordinary hook bolt where cement or vitrified pipes were used, and holes were punched in the pipe and the hook in the bolt was set into those holes, and then the hole into the pipe was cemented up. Then, afterwards it was discovered that they could punch holes in the ends of the pipe and set what we call lag-screws, [53] or stud-bolts in those holes, and they were cemented in place in the pipe, the cement holding them by reason of their being threaded, or having a bent end, and the gate was bolted on in that way. Then, there were a great many pipes provided with a bell end where it was sought to attach the gate or valve and eye-bolt end of the pipe, a collar was put back of the bell, and that collar was fastened together so as to surround the pipe in such a way that it couldn't slip over on account of the bell end, and the gate or valve was bolted to that. Wherever these bolts were used, the valve or gate was fastened onto the end of the pipe, or made water-tight,—well, it was not fastened by being packed with the cement. Then, later valves and gates were constructed with bolts or lag-bolts, or something which were like your finger, and cast integral and fastened or riveted to the valve or gate. They were simply set on the end of the pipe and cement was packed in around them, and it in time

(Testimony of George C. Martin.)

would set and become part of the pipe, and having the bolts in would hold the appliance in place.

The first device that plaintiff used prior to the patented device might be considered to be something like the present device, and it was set inside of the bell end of the pipe. The only distinction between it and the present device in general effect, would be that on the outside, inside or lower end of the flange was a bead or a projection; that was set into the bell end of the pipe and a fillet of cement was filled in between the pipe and the flange, and it was held. By attaching it in that way, that little fillet and that little bead would be unable to slide out, and hold the gate in place. That, however, was found impractical; for some [54] reason or other it did blow out. Later, a hook-bolt was attached to the gate, run down, a hole bored through the pipe, and it was bolted in place with that hook-bolt. Of course, in that practice, where the gate was set down inside of the pipe, the cement being packed around it, formed a part, practically, of the pipe, so it were in effect as though the gate and valve were actually molded into the pipe.

That practice would necessarily obstruct the flow of the water to the extent that the valve—the insertion of the valve reduced the orifice of the out-flow, and the advantage of having the full outlet is this: That a man in planning his irrigation knows, for instance, that he has so many miners' inches of water and knows how many valves to put on his

(Testimony of George C. Martin.)

land, and knows how many miners' inches of water his land needs. Now, if he has got to use a valve wherein the outlet is smaller than the valve, he has got to put in bigger pipes than he needs, because he has got to have a pipe big enough to carry his valves, not big enough to carry his water.

To obviate the difficulty of making the main line bigger they would take a bigger pipe and place it over a smaller pipe. That does not seem much; that does not seem to be a very serious matter, but these pipes are all made in moulds; I think it is safe to say that we manufacture all the moulds used in this country. The moulds are more or less expensive. If a man were obliged—he may only have needed twenty-five or thirty of these little stand-pipes, but he would have to buy a mould-set to make those twenty-five or thirty lengths of pipe for a stand-pipe.

Q. Now, when I interrupted you, Mr. Martin, we were speaking about the prior devices used by complainant, and you spoke of the flange or rim or bead around the bottom of flange that fitted onto the inside of the pipe over which a cement filler was put. Was a cementitious filler used in said device for fastening onto the pipe? [55]

A. No. it—as far as the meaning of a cementitious filler is applicable to this patent, it would mean a cementitious filler or a filling of cement between the flange and the pipe. In the old use the cement was piled or moulded over the end of the pipe down into the inside, and over a little bead or ridge on the valve itself.

(Testimony of George C. Martin.)

When that cement was plastered in, it would adhere to and become a part practically of the pipe itself, and would, as the other witnesses just described, require to be sheared off in order to blow the valve out, but it was found in that practice, that was the first experiment made, that it would not, in fact work; we did have blow-offs. That was before I was connected with the company, but I know what happened. I have seen the old parts and the old drawings. Then, later a bolt was put down here on a riveted end through some convenient part of the flange and fastened on here, bored through the pipe itself. This bolt passed through that hole and a nut or washer put on the end, and then a cement packed in. That made a good union—it made a good tight union, and you couldn't, of course, pull it out, but the difficulty was it couldn't be put in, and it required the pipe to be punctured, and the difficulty was in punching the holes through the pipe it broke the pipe; while these pipes are hard and durable, still they do break.

The stand-pipe with the gate on the inside as a matter of fact, was attached in the same way. Now, where a man desires, as he sometimes does, to pass water right through the line, he puts a valve on top. That closes the top so the water must flow through, but when he opens that valve, he has got to have enough pressure for the water to come up through the [56] stand-pipe. Sometimes he hasn't enough head; therefore he puts on a gate. Now,

(Testimony of George C. Martin.)

where he puts a gate on, he puts the gate on just exactly as described in that patent. There is the opening and the gate and the lid that goes over that opening, with a handle that extends out over the pipe. Now, that gate is fastened onto the end of the pipe just exactly the same as the valve we have described is fastened on the end, except in this case it is horizontal. A valve would do just as well here. Now, the water coming through, when he closes the gate, comes up and spills out on his irrigating.

The pressure on that valve placed on the inside of the stand-pipe is on the face of the valve, and its entire tendency would be to keep it in place. Now, as Mr. Bent says, where he put them on in the first place in that same stand-pipe, he used to put them this way on the inside so they would be sure to hold. Now, he very frequently puts that gate on the outside.

As a business manager I say that the effect of the infringement of defendant on plaintiff's business is of course, we lose business wherever they make any, and we are unable to charge as much for our valves as we believe they are worth. Our business is very much hurt by the Snow competition.

Q. (By the COURT.) I would like to ask the witness a question. I don't think you testified, you have stated your familiarity with the prior art for a considerable number of years,—what have you to say with reference to the plaintiff's device as being the first application of the principle embodied there

(Testimony of George C. Martin.)

in the art in holding the valve or gate in the position that his patent calls for?

A. I have examined all of the patents in the Patent Office on this art of valves and gates, numbering something like six thousand. I think I have had and looked over every [57] patent in any water distributing system, and so far as I know, this is the first, and until defendant's use, the only use that I have ever seen or ever heard of, either in the patented art or in the prior art, where a cementitious filler alone was depended on to hold a gate or valve on the end of a pipe under the water pressure, or in any other art.

Cross-examination.

The element of the claim of this patent in suit,—a plate having an opening through which water may flow,—is not a new element. Plates with openings through which the water may flow, of course, have existed in the water distributing art such as rain spouts, for hundreds of years; there have been many of them; the flange carried by the plate is an old element; it is old to use a plate with an opening and a flange. All the uses where that combination is found provided for, a flange fitting as close as it can be, usually a direct fit over the end of your pipe. Of course, you can't get anything to fit over anything else without an annular space, but the patent here provides for an annular space in its broad sense, big enough to pack with cement, because if the space is small and you can't pack with cement, you

(Testimony of George C. Martin.)

can't get your result. Where this flange and annular space and cementitious filler are used with a plate, they are absolutely new; where they are used in continuation of a pipe-line, they are not new, because I have seen pipe-lines in Pompeii that have been there thousands of years. That plate has a very important function, because that plate is what holds the head of the water. Where you have just the flange ring, or the flange and the spigot end in a continuous pipe-line, you don't have any head of water against it. Where you have a plate you do have a head of water. [58]

Q. (By Mr. SEVERANCE.) If I find in the prior art a device having an opening through which water may pass, and having flange projecting from said plate, and so forth, to encircle the end of a pipe to form an annular space between the flange and the pipe, and a cementitious filler between said flange and said pipe, I have all the elements of the claim, haven't I?

A. No, you haven't all of the elements, and you haven't the most important element, because the most important element of all, figuring that way, is the lid, or plate, or closing means—slide as it is described in the patent to hold the hydrostatic head of water. You will find plenty of instances in the prior art where all these things with something else are present.

I find in the claim, this element,—a gate.

If, with the other elements you find in the prior

(Testimony of George C. Martin.)

art a gate susceptible of being opened and closed, you will have all of the elements of our claim. Of course, you understand that it is my interpretation of the prior art that the omission in this patent of some old devices distinguish it very materially from some of the prior devices. For instance, if a hook-bolt were used, or a ring, or collar, or a lag-screw in addition to what we have here, a man would have all the elements that we would have in our invention, but we would not have all the elements that he had in his. We omitted an element that is the whole function of the thing. We get this possibility by making the cement holding amply strong.

Cross-examination.

The face plate is described as being provided with a suitable seat for the closing means, and a flange for encircling [59] the end of a pipe. The specification says: "It may be rivetted." Of course, in the actual practice of the art now it is cast integral with the plate. In the specification it is shown as a flange fastened, rivetted, bolted, screwed, or in any other convenient manner fastened to the plate, and in the claim it simply describes the plate and the flange as being part of the same device. It would not make any material difference in the patent, if it were rivetted or cast integral. The plate 6 in the specifications and the ring 12 are separate, or, rather, they are separately described. They are bolted, however, together and become one part.

The claim of the patent simply calls for the plate

(Testimony of George C. Martin.)

and the flange. It is immaterial whether the plate and the ring, as you describe them, are cast in one part and simply called a plate and a flange, or whether they are made separate and bolted together. We could, for instance, take this valve and saw it in two and have a plate and a ring together they simply comprise the plate. Of course, in this patent, there are simply described, a gate, and it is specifically stated it is immaterial. The only claim in the patent is the combination of the flange, the opening, the plate, the cementitious filler, and the pipe. The specifications simply describe, one manner or method of making this gate. In the first place, they were made in two parts because it was thought they wouldn't come out of the sand so easily; we had to make them in two parts. Now, however, we use cores and get the whole thing out of the sand in one operation, which saves our rivetting it. It was the notion of the patentee if this patent covered anything at all, it covered practically every use of this art, and there was no intention to limit it to any specific—
[60]

The forming of annular space around the end of a pipe is not an old element in the sense of its use in this patent.

Q. (By the COURT.) Well he is not asking you that. He is asking you if it is an old element, and undoubtedly it is an old element, but this application,—the function it performs may be the very secret of the novelty.

The WITNESS.—What I mean by what I said

(Testimony of George C. Martin.)

was this: That it is old to use a plate with an opening and a flange, but it—

Q. (By Mr. SEVERANCE.) Then the plate or flange is old according to your statement, and do I understand you that the cementitious filler between a flange and a pipe is not new?

A. Oh yes; it is very new; I don't know of any similar use.

Never saw it used before; I have seen many cases where cement has been packed around the union after the union has been made by bolts or by screws.

Q. (By the COURT.) Well, the result of that is that the element is old, but the application of it is new.

A. Yes, and there is a new element; there is the plate.

We omitted an element.

For instance, what I mean is this: If you will assure us—if you will assure us you will provide means and see that they are followed for having this gate of yours bolted on like in the prior art, we won't claim infringement.

We don't sell pipe with the article. We simply put it out in the form in which it is shown here in the exhibit. It must be used, of course, to have any value, with the pipe, as they are used, or as in ours.

I have never seen any structure with the bell and spigot joint similar to this in which a valve has been secured, [61] a valve or gate has been secured to piping by cement.

(Testimony of George C. Martin.)

Testimony of Arthur S. Bent, for Plaintiff.

ARTHUR S. BENT, called on behalf of plaintiff testified as follows:

I am 53 years old; live in Los Angeles; am a contractor in concrete construction and specialize somewhat in concrete pipe-lines. I do not know as I am an expert. I have done a good deal of that sort of work; I am familiar with cement; and pipe connections, the pipe consisting of cement and the device being of metal construction; have engaged in that line of construction twenty-five years. My recollection is that my impression at the time I first knew of plaintiff's device #2, it would not succeed because I thought it would blow off under any considerable pressure. That was before I had seen it *it* tested. My recollection of the prior devices without remembering them in detail is they were all of a sort which had the flange which could be cemented over so that the moulder made a bond over the iron. The moulder would have to be sheared to separate them, or else to have ears and lugs or devices of that sort which could be physically joined to the pipe, requiring something more than a straight lift to separate them.

Until I saw plaintiff's device, I don't remember any device where they depended upon a cementitious filler between a straight flange encircling the end of the pipe and the pipe.

Cross-examination.

The reason I supposed the cement was not used

(Testimony of George C. Martin.)

in connection with the iron, was a general doubt as to its success. We always placed our ordinary slide gates with the water pressure against the gate, but since then I have often stuck a gate right on with the water pressure behind it and had it hold. Previous to some such experience as this. I would not have expected it to stay.

I don't think I ever had seen a cementitious filler used where it was required to obtain a hold upon the iron to hold it on the pipe up to the time I first saw something [62] of this sort. I don't know whose this is, but a cap of this sort was the first time I had seen it done. I thought that a device of this sort would blow off. The kind I was familiar with were fastened by other means, the ears and lugs—the devices that I was familiar with at that time had some protecting iron or an arrangement by which the moulder could come up over the iron so that the moulder itself would have to be sheared. It is hard for me to remember just what were in use at the time I first saw this. I remember this was new to me and I expressed some doubt as to whether it would succeed. We have used valves *or* various sorts for many years, the moulder fastening onto the iron in different ways, but I don't recollect anywhere there was nothing to prevent a straight lift, except the bond between the cement moulder and the iron, I don't remember any.

One difference between the ordinary bell and spigot type of joint for connecting another article or a pipe to the end of a pipe and exhibit #2, complain-

(Testimony of George C. Martin.)

ant's device is that the water or liquid is flowing through the pipe. If it is stopped at the end, of course, the pressure at the end is a lateral pressure, a wrapping joint which could hardly break out, and then there is a skin friction of the conduit with the earth with which it is surrounded. The conditions seem quite different to me; a joint in a pipe-line would not be like this.

A. Why, the conditions seemed to me quite different. If this cap were taken off—if the plate were taken off and the water allowed to pass through, I wouldn't expect this to come off—I wouldn't expect the frame to come off; with the water locked in there, I did think it would come off.

The principal of the joint is practically the same. The difficulty was partly to get the strength necessary to hold such a device in place over the ordinary bell and spigot joint; but [63] the effect of the force would be entirely different. If you put a hydrostatic head on your pipe-line, it would not have a tendency to pull the pipes apart; it would have a tendency to break them—rupture them.

On redirect examination, referring to exhibit 3, Defendant's Commercial Device.

Practically there is no advantage in having one shaped as the defendant's device, over the one shaped as complainant's is. I have never known one of these to fail that I have had any experience with.

In "Defendant's Commercial Device" the interior leaves or flanges that appear on the inside of

(Testimony of George C. Martin.)

this flange, have a tendency to give a greater holding capacity.

I am a small stockholder in the plaintiff company.

Testimony of George Sidney Binckley, for Defendant.

GEORGE SIDNEY BINCKLEY, called on behalf of defendant, testified as follows:

I have been engaged in the practice of engineering of various branches in mechanical, mining, civil, and hydraulic work for about twenty years; I am a member of the American Society of Civil Engineers, and at present, my practice is in hydraulics principally, my occupation being that of consulting hydraulic engineer. I am familiar with the Kellar patent in suit.

Q. Compare the elements of the claim, in a general way, with the bell and spigot joint which has been referred to.

A. Do you refer to the bell and spigot joint as employed in a pipe-line, or as employed in connection with a gate?

In examining this claim, I find a gate and plate through which—with an opening through which water may flow, a pipe [64] having its end abutting against said plate, an outwardly projecting flange encircling the end of said pipe, and a cementitious filler in said annular space securing said plate to said pipe; I think that covers the elements in the claim.

The bell and spigot joint: As employed in connection with a pipe-line, the elements are a pipe having

(Testimony of George Sidney Binckley.)

an enlarged portion, or bell adapted to encircle the end of a corresponding pipe, and having an annular space within which is placed the material, and with which the joint is made. In connection with a valve or gate, there is in this combination a gate; that is to say, that part of the structure which closes the aperture in what has been described as the plate, and there is the outwardly projecting flange attached to the plate and adapted to encircle the end of a pipe, which generally abuts upon the metal at the end of the plate. I used the term "plate" because that seems, and previous testimony seems to have been taken as meaning that part of the structure upon which is formed the seat that carries that element I have described as the gate. The annular space in such a case is for the purpose of receiving the material with which the joint is made between the end of the pipe, considered as a structure. I think that covers the description.

HASSALL PATENT NO. 318,616.

There is disclosed here what is plainly a bell and spigot connection with some novelty of filling. That is the only thing I see in this. This filling is described in the specification as 'plastic cement'—such as mastic or like cement. This forms a cementitious filler between the parts.

I don't think I would say that this joint, as shown here, could be compared to the gate as disclosed in the [65] plaintiff's patent, this being purely a joint in a pipe line.

(Testimony of George Sidney Binckley.)

GALVIN PATENT NO. 337,945.

I see a significant connection between that and the patent in suit on sheet 2 of the Galvin Patent, Figures 4 and 5. There is apparently existing in this the elements that exist in the patent in suit. There is what may be particularly *be* described, I think, as a plate, in the sense that it has been used. There is the gate for closing the aperture through the plate. There is the projecting flange, and apparently from the structure, the conventional structure of this bell, it is intended to provide an annular space around the pipe and which enters this bell, the annular space being for the customary purpose of receiving packing material.

BURRITT PATENT NO. 515,514;

The same elements described in the patent to Galvin exist in this patent to Burritt, except they are duplicated on the two sides of the gate itself. In other words, this gate is plainly intended to resist pressure from either direction, while that of Galvin is only adapted to resist pressure from one direction; they both employ bell flanges adapted to receive a pipe; it is plainly intended that there shall be an annular space for the purpose of receiving the caulking material.

BENTLEY PATENT NO. 827,409.

This is a pipe connection having certain structural peculiarities, and I find a reference here to cement or other filling; it is stated here that the socket A is further provided with an inner flange or rim E, suffi-

(Testimony of George Sidney Binckley.)

ciently deep to permit *or* ready insertion of the spigot end of the next pipe and provide the required clearance or opening F for the introduction of the binding material. I saw somewhere in this reference to [66] cement. Yes, (reading:) "This chamber is filled with cement, lead, or other binding material H."

SEITZ PATENT NO. 779,973.

This is described by the inventor as an irrigating head-gate in this. The elements consist of a plate having an aperture through which water may pass, a slide gate, the function of which is to close this aperture, and on the opposite side of the plate is a projecting flange, in this case adapted to enter the bell end of a pipe. Between the flange and the interior bell of the pipe exists an annular space. In the specification this annular space being described as being of sufficient width to allow the putting of cement 6 or other packing material in place after the conduit has been connected with the plate 1. There is also in this case a flange surrounding the pipe which is provided with bell and bolts connecting this flange with the gate itself, or gate structure, by means of which the gate structure is drawn up into position at the end of the pipe, which is provided with the bell. Comparing the Seitz patent carefully with the elements of the patent in suit, I find a gate having a plate with an opening through which water may flow; a pipe having its end abutting against said plate, adjacent to said opening; I hesitate over the exact meaning of the word "adjacent"; it is in prox-

(Testimony of George Sidney Binckley.)

imity to that opening; I find such a flange forming an annular space between the end of said pipe and said flange; I see that cement is specified in the description,—“cement or other packing material.” You may say a cementitious filler in that space. This is an example of a cementitious filler holding an [67] iron pipe with respect to a cement, vitrous or tile pipe, except that it is proper to notice the fact that additional means of securing the gate to the end of the pipe are shown in the Seitz patent, namely, the four bolts passing through the gate structure, and the ring behind the bell on this pipe. The function of these bolts, I will not, however, express an opinion on, as it may have been the inventor’s idea that they were necessary for strength and security, and it may have been his idea that they would have been convenient in the assembling of the gate on the end of the pipe.

By the COURT.—The specifications here call for—cement or other suitable packing material. I would hardly say, from the specification and the claim here, that the so-called packing material was intended as a holding device.

The WITNESS.—I think that inference is the one that I did, myself, make. It is to make, undoubtedly, a tight joint.

In fact, in 55 he has specified cement or other suitable packing material for the purpose of making a water-tight joint; hence, he apparently relies on the bolts for strength.

(Testimony of George Sidney Binckley.)

The COURT.—Yes, it would indicate that it must have been.

Q. (By Mr. SEVERANCE.) Would the cementitious filler and water-tight connection have had any degree of holding effect upon the parts most in need?

A. It might easily be quite sufficient for the purpose although not anticipated by the inventor.

JACKSON PATENT NO. 927,353.

This is a bell and spigot joint with certain structural peculiarities consisting of three lugs extending inwardly from [68] the inner surface of the bell, which appear to have the function of centering a spigot end of the pipe in the bell. There is with the interruption of these lugs, an annular space adapted to receive a packing material, caulking material, of whatever character it may be. There is also in this specification in line 95, “. . . . to allow the cement to flow in around the spigot end of the pipe sections to firmly retain the same in position and to make a very rigid joint,” reference being to a cement filler.

WORLEY PATENT NO. 969,320.

This is described by the inventor as an irrigating pipe gate in this case. The slide gate proper rests against a circular flange fitting inside of the end of the pipe and secured to the end of the pipe by cement, apparently,—yes, in 95, with reference to the luting 18 of cement is then applied around the collar and against the end of the pipe so as to cement the collar firmly in the pipe.

(Testimony of George Sidney Binckley.)

BUTTORFF PATENT NO. 976,720.

The inventor describes this device as a headgate. In the Buttorff patent I find a plate—an opening through the plate which water may pass, a flange, rearwardly projecting flange from this plate, and a pipe abutting against said plate, with an annular space between the outside of the pipe and the inside of the rearwardly projecting flange, together with the slide or gate proper by means of which the opening through which the water flows may be closed. There is an additional element in the Buttorff patent in the bolts which connect the plate, having a rearwardly projecting flange to the pipe. These bolts extend from inwardly projecting lugs in the annular space between the pipe and the interior of the flange, and other lugs attached to the pipe itself.

[69]

Q. (By the COURT.) They perform apparently a similar function to that found in the Seitz patent?

A. I don't think so, your Honor, because the structure of this plate and the attached or integral flange, together with the character of pipe that is shown, would in itself be such that if the annular space were filled with cement it would be impossible to remove the gate from the end of such a pipe. My impression would be that the function of those bolts would be merely to hold the gate in place while the cement was being put in place, my impression being based on the obvious fact that such a cement filling would provide a connection of very great strength.

By the COURT.—I couldn't concur in that con-

(Testimony of George Sidney Binckley.)

struction; there is too much strength in that construction—apparent strength for a mere temporary purpose such as would be subserved by holding it in place. I would be inclined to say they were intended for strength in the annular filling there for a tight joint.

A. It may have been the inventor's intention, Your Honor.

Q. In this Buttorff patent then you find all of the elements stated—all of the elements that are stated in the claim of the patent in issue, do you not?

A. Yes.

The Wakefield patent has certain structural peculiarities. It appears that the bell end, as shown on this pipe is provided with a broken annular groove in one side forming a lock for the spigot end—a mechanical lock.

ENGLISH PATENT NO. 7,742 OF 1837.

I find in Fig. 2 an example of a gate adapted to resist pressure in one direction, consisting of the gate element proper, the seat upon which this gate rests, which has been described as a plate, and I find a rearwardly projecting [70] flange which is plainly intended to receive that end—the spigot end of a pipe, providing an annular space around said pipe, which may be filled with any suitable material for rendering the joints tight and firm. With the exception of the spigot end of the pipe, the presence of which must be inferred, all of the elements described in the Kellar patent appear to be present in this English patent. No additional means of filler are

(Testimony of George Sidney Binckley.)

provided for holding the spigot end of the pipe, except the inclosing flange.

Copies of said letters patent are offered in evidence.

Q. Mr. Binckley, quite a little has been testified about the strength of a cement filling employed for fastening valves, gates or the like to piping where it was necessary for the filler or cement to obtain a certain degree of hold upon the metal. I would like to ask you what you know of this and of the history of fastenings of this kind.

A. I think that the use of cement in making such joints is a very great antiquity. We have an example in a number of National Geographic Magazines which are here in court, of a bell and spigot joints, which are said by archaeologists to have been in use about thirty-five hundred years ago on the Island of Crete on the Palace of Cnossus, and it is said by the writer, who is the authority for this, that these pipes were cemented together. There is here for the information of his Honor a picture of these pipes in this number of the magazine which we have. In addition to the well-known antiquity of that form of fastening, there are a good many modern examples. The description, your Honor, is on another page. There is no doubt that the use of cement in the annular space in the bell and spigot joint makes a very strong joint, indeed. It is not a [71] matter of opinion or doubt. I don't know personally of any tests having been made as to the actual strength of such a joint, but that method of joining pipes to-

(Testimony of George Sidney Binckley.)

gether and of joining gates to the ends of pipes has been in use by the water department of Los Angeles, I believe, upwards of twenty-five years, and it is the standard method used today all over the city in pipes exceeding ten inches in diameter, nothing else being used except where the conditions are such as to preclude the possibility of giving the pipe time enough without water in it to allow the cement to harden.

(Catalog of the Crane Company published August 1902, pages 110 and 118 are offered in evidence as Defendant's Exhibit "L.")

I have myself used cement in making a connection between the end of a cast-iron pipe and a cast-iron gate. I made this application of knowledge that I had of this method of joining pipes in the city of Monterey, Mexico, just about ten years ago; I think it was about to the month ten years ago that I made such connection between the end of a cast-iron pipe, a ten-inch pipe and a twelve-inch bell and gate valve on the end of this pipe on the outlet of a reservoir forming part of the water works system of the city of Monterey; it was our auxiliary reservoir; the valve was similar to the standardized valve we have had before us, and fastened at the end instead of an intermediate point in the pipe.

The pressure customarily encountered in water supply systems for a city, of course, are customarily in excess of those that are used in irrigation practice. The pressures ordinarily encountered in irrigation practice where cement pipes are used are generally very trifling, a matter of a few pounds to the square

(Testimony of George Sidney Binckley.)

inch, while those in the distributing [72] systems of the water supply in the city run up very high; pressures of a hundred pounds to the square inch are not unusual.

Comparing the character of a cement joint disclosed in the Buttorff patent with that shown in the patent in suit, the joint shown in the Buttorff patent would be the strongest. If the bolts shown in the Buttorff patent were absent, it would still be the strongest; by reason of the mechanical law, which is provided by the forms of a flange and the pipe. You see, the valve not only has a slant, but the pipe has a flare. The mechanical law that is provided by reason of the shape of the valve and the shape of the end of the pipe, that make the line such that even though the cement filling was not water-tight at all, it would prevent the removal of the gate from the end of the pipe—or appliance from the end of the pipe, without either the collapse of the pipe or the rupture of the ends. Assuming the bolts were ignored altogether, it is a very stronger joint. I think that the cement or other rigid parts of the device would break before the yielding quality of the others would have effect.

The type of connection for the bolts and eyes shown on this Patent Office drawing, which, of course, generally makes no pretense to making proportions, that connection would be very weak; naturally, it could be made strong if one chose to do it, but as shown, it is a very weak connection.

(Testimony of George Sidney Binckley.)

By the COURT.—The witness gave it as his judgment yesterday, in referring to this particular device, that that bolt connection was made for temporary stay while the cement was setting.

Mr. SEVERANCE.—Yes, that was suggested.
[73]

The COURT.—In that I couldn't agree with him.

Mr. SEVERANCE.—You couldn't? Well, possibly not—

The COURT.—Because I do not think that the general structure, and for the very reasons that have been suggested by the witness himself, that would call for any necessity for a temporary stay; I think they were intended for additional strength.

The WITNESS.—They may have been so intended by the inventor. I merely expressed the opinion, however, that they were wholly unnecessary in view of the excessive strength of such a joint.

Comparing the illustration in the exhibit "L," Defendant's Exhibit "L," "Crane Catalog," with the claim of patent in suit, when this gate *in* assembled with the pipe inserted in the bell, and the cementitious filler in the annular space between the pipe and the bell, I find all of the elements in this claim to be present in this gate. I find in this gate, as shown on page 12, of the Crane Catalog, a gate having a plate in the sense that the word has been used here, with an opening through which water may flow, a pipe having its end abutting against said plate, adjacent to said plate against said opening, said plate having an outwardly projecting flange

(Testimony of George Sidney Binckley.)

encircling the end of said pipe and forming an annular space between the end of said pipe and said flange, and a cementitious filler in said annular space securing said plate to said pipe. All of those elements are present in a standard gate-valve such as that illustrated on page 110 of the Crane Catalog when assembled with a pipe and the annular space filled with a cementitious filler, which I have stated that I have myself used about ten years ago, in Monterey, Mexico.

Comparing the claim of the patent in suit and the device with the commercial type of valve in the catalog, the [74] function of the flange in each case is the same; the construction is not identical, inasmuch as the flange in the Kellar gate, as exemplified by this frame and flange before me, is a separate piece, while the flange in the commercial gate, as shown in the catalog, is cast integral with the gate itself; that is the only essential difference.

Ignoring the facts that these two elements in the Kellar gate are separate, the functions are the same, and the essential structure is the same.

I find the same elements or the elements of the claim identical in the commercial valve with the same identical purpose and function. They are alike in all essentials including their function. In other words the elements described in the claim are all present in the commercial gate, when assembled with the end of the pipe inserted in the bell and the cementitious filler in place.

The COURT.—But there is a well established rule

(Testimony of George Sidney Binckley.)

if the principle has been applied in a way that would not suggest the application and function that it is performing under the patent in suit, that it is not necessarily an anticipation at all.

Mr. SEVERANCE.—No, we do not find that such has been the use.

The COURT.—My comment was simply in connection with the witness' statement that all the elements were there, and that is true, the elements are there, but whether or no they would suggest to the mind of the practitioner the specific function to be performed by the novel feature of this is a different thing.

Referring to defendant's Exhibit the "Pomona Ring" Exhibit "M." [75]

Mr. MONTGOMERY.—In order to expedite the matter, I might make an explanation with regard to this ring which does not seem to me at all material. Of course, that fact that it is not designed to obstruct the flow of water, or have anything to do with water, except to form a cover to the standpipe—

The COURT.—I was going to ask that. Is this used in connection with a practice which is calculated to have to resist pressure?

A. No, your Honor.

The COURT.—Then, I don't see the value of this for present purposes at all. I thought when you first brought it forward it was intended to —

Mr. SEVERANCE.—No, only as showing the old use of attaching a flange put over the end of the pipe.

The COURT.—Well, I don't find anything in this English patent that enables us to do other than

(Testimony of George Sidney Binckley.)

merely infer what this annular space would be. I don't see any direct reference to it. Can you find in the English patent anything that directly refers to the method by which the annular space—

Mr. MONTGOMERY.—It is only by inference, your Honor.

The COURT.—It is only by inference, yes.

Mr. MONTGOMERY.—Conventional form.

The COURT.—Yes.

On Cross-examination.

Q. You stated on your direct examination that the elements of the Hassall claim, exhibit “B,” were a flange face and a filler. What other elements do you find beside the above in the patent?

A. I find two concentric rings described in this specification, in which it is said the spigot end—or I will [76] go back, “In the drawing A represents one pipe section, which is provided with a socket B and shoulder C at the inner end of the socket. A in the adjoining pipe section, the spigot end of which is inserted into the socket B and tightly stuck there by two concentric rings, D and I, which are either cast by means of a cylindrical mould into the socket B and around the spigot end of the pipe A or placed loosely therein as desired. Between the adjoining surfaces of the rings D and I a plastic cement—such as mastic or like cement—is placed, by which a tight joint is formed. The inner edge of the ring I is made bevelled, so as to prevent the cement from being forced forward into the socket B when the pipes are being pressed to-

(Testimony of George Sidney Binckley.)

gether. The surplus fills the annular space formed between the bevelled edge of the inner ring and the outer ring, as shown in the drawing. This pipe joint is very effective when the same is not exposed to much strain or pressure.

Cross-examination.

Referring to exhibit "B," the Hassall claim.

In the specification as to whether the pipe joint is adapted to withstand pressure, it is stated, "This pipe joint is very effective when not exposed to too much strain or pressure."

Referring to exhibit "C," the Calvin hydrant.

It might be the case that the packing material in the groove of the ring be a gasket of rubber, although it is not a thing that I would consider likely. The purpose of the groove in the bell end of the ordinary pipe, bell and spigot-pipe, is to retain the material which is caulked into it; lead, as I remarked in former testimony, as being the common and oldest generally used material with cast-iron pipe. [77]

Exhibit "E," the Bentley patent, I consider this patent significant in connection with the patent in suit, only so far as it exhibits a form of bell and spigot joint.

The specification states, "This chamber is filled with cement, lead, or other binding material H." The shape of the structure has this effect as a binding means, it provides a mechanical lock assuming the filling material of such character as to be strong in sheering.

Exhibit "F," the Wakefield patent, I consider

(Testimony of George Sidney Binckley.)

only significant in connection with the patent in suite, in illustrating one form of bell and spigot joint. There is a mechanical lock indicated in this, independent of the filling material.

Exhibit "G," the Seitz patent, according to the specification, the gate is not intended to retain water in the pipe, it is intended to resist the entry of water into the pipe. The binding element consists of four bolts.

In Exhibit "H," the Jackson patent, the purpose of the lugs in this device is primarily to center the spigot end in the bell.

In 63, it says, "The lugs C also are provided with a pocket F for retaining a packing of hemp G and for allowing the cement H to flow in around the spigot end of the pipe section to firmly hold the same in the socket."

This patent is significant in connection with the patent in suit, to a limited extent only, showing the use of a cement filler in a bell and spigot joint.

Exhibit "I," the Worley patent, on line 16 refers to the water flowing into the pipes, and line 34 shows that the device is to be placed on the inside wall of a ditch, and line 75 reads, "—so as to prevent water from flowing into the [78] collar from the ditch or some other source of supply." It seems very plain that the device is intended to receive water from the irrigating ditch.

Q. (By the COURT.) Well, it says, "this luting may also embed the posts 11 and 12 thus permanently securing the collar in the end of the concrete pipe."

(Testimony of George Sidney Binckley.)

What is meant by the term "luting"?

Mr. MONTGOMERY.—Luting is an adhesive substance.

A. Claim 3. These wire members are described as being bent to form clamping limbs, and the luting is described as embedding a portion of said wire members to retain the collar in place.

This patent in general is somewhat similar in its method of permanently securing the collar to the end of the concrete pipe, to the method as employed by Mr. Kellar that was described yesterday, where a collar with a bead around the bottom was placed on the inside of a pipe.

Q. Exhibit "J" I believe is the Buttorff patent. Is this gate designed to retain water in the pipe, or to receive it from a ditch or canal?

A. I think it would perform either function.

Q. What was it designed for? What was the patent claimed for?

A. I find in 15, "My invention relates, generally speaking, to improvements in flood gates, adapted to control the flow of water from an irrigating ditch or canal to a lateral or branch ditch which supplies the consumer with a pre-determined quantity of water."

THE COURT.—This really is in the nature of a measuring gate.

A. That is practically what it is.

With respect to the use of a hydrant in Monterey [79] Mexico, I've forgotten what make of valve it was; it was a twelve-inch spigot end, or I should say,

(Testimony of George Sidney Binckley.)

bell gate valve, and I don't remember now where I got the valve....

There is a bead on the end of the bell; it is a standard method of construction on the bells of either pipes or gates. The purpose of that bead is to furnish additional strength at that point.

There is a groove on the interior of the bell. I think there is no doubt but that I had a curve on the flange of the valve which I set. I don't believe that I ever saw one without it before this. The spigot end of the iron pipe to which this gate valve was attached was that of the regular standard cast-iron pipe; it was a piece of stock pipe the same as I used on the other parts of the system. I really don't know whether it had a bead on the end or not. They usually do, your Honor, but very frequently the bead is lost by the necessity of cutting the pipe to length, but in this case, likely as not, this bead was cut off. I don't know; I paid no attention to it and laid no stress on it, because I was not nervous about it. This gate was designed to be a part of the system but was not connected at once.

I believe it was subject to pressure before its eventual connection with the pipe.

The term "gate valve" used in commercial work is a valve in which a vertical—I say a vertical, a gate is inserted at right angles to the line of flow of pipe; that is to say; the axis of the pipe. The term gate-valve is used in such a case in contradistinction to the term globe-valve, where the aperture is closed by pressing a disk to a seat within a cast which is gen-

(Testimony of George Sidney Binckley.)

erally globular in form; hence the [80] name globe-valve, and in commercial and engineering work, the distinction is made between gate-valve and globe-valve, because the gate-valve leaves a perfectly clear aperture in the opening of the pipe, while the globe-valve forms an obstruction, and has that difference in its structural elements.

Redirect Examination

Q. Are you of the opinion that it would make any substantial difference in the hold of the cement upon the iron, if the walls of the flange and the pipe were not parallel—were not substantially parallel?

A. If they are converging walls to the flange, as shown in the Buttorff patent, it would form a mechanical lock; if these walls diverged, that mechanical lock would be absent. Therefore, I would say where the walls converge, as they do in the Buttorff patent, there would be that difference, there would be a stronger connection, because in the other case adhesion alone would be relied upon in the Buttorff; the sheering strength of the concrete becomes a controlling factor.

I should say that the adhesion of cement upon the iron would be sufficient for most ordinary pressures, as such, for instance, as they might have in an irrigating system, if the divergence of the flange is not too great. If it approaches parallelism, it would be practically the same. It was testified yesterday by one of the plaintiffs that there is an actual slight divergence in the flanges, but I don't believe such

(Testimony of George Sidney Binckley.)

a divergence would make any serious difference so long as it was slight.

The relative pressure likely to be on any irrigating system as to the pressure that would be upon water-mains is probably one-twentieth of what would be upon water-mains, [81] I should say; naturally that will vary according to the conditions under which the irrigating is done.

Recalled and asked to compare "Complainant's Commercial Valve" with the claim of the patent in suit and also with the standard Crane valve of Exhibit "Crane Book" says:

In comparing these two valves with the Crane, assuming in each case that the valve is assembled with a pipe connected to it with a cementitious filler, the elements in the claim exist completely in both of these valves, the complainant's valve and in the Crane valve. The essential elements in the claim in the Crane valve, and in the complainant's valve are identical, and the functions of those elements are identical. That, with strict reference, of course, to the claim, its wording and the elements as laid down in that claim, I find substantially the same elements used in substantially the same way and for the same purpose.

Recross-examination says: There is a groove on the interior of the bell in the Crane valve; that, however, is not an element which is recognized in the claim, and I would not consider that as an element in the structure itself. It is a structural detail which

(Testimony of George Sidney Binckley.)

may or may not have a practical importance. It may have a function where used with lead; it unquestionably has a function where used with cement.

Recross-examination.

I don't remember having seen a concrete pipe with a metal flange connected by means of a cementitious filler alone before the patent in suit.

Testimony of John Mitten, for Defendant.

JOHN MITTEN, called on behalf of defendant, testifies:

I am 36 years of age, been working for the city water department of Los Angeles, California, for the past ten years as a caulker—a pipe man. [82]

In making joints with iron pipes, or pipes and gates or valves what we generally use depends a good deal upon the size of pipe; the way the county now has got of saving it is using cement instead of lead, and we have used a whole lot of cement—lots of cement; in the majority of the big pipes it is all cement.

Anything above three-inch we generally make of the cement joints; the use of cement in making joints has become standardized with the water department here; we have found in the Los Angeles Water Department the strength of the cement joint under heavy pressures upon the connections successful. We have turned in as high as 110 lbs. pressure against such cement joints. It has been well known that cement makes a strong joint with iron mechanisms under pressure; we have made cement connec-

(Testimony of John Mitten.)

tions at the end of a pipe, but on where we got extreme pressure we generally block them, or put on what we call a lug, and we have, furthermore, on the low pressure where we don't pay much attention to blocking them at all, but under our extreme pressure we generally block them; we give them a good backing; that is on heavy pressure. Of course, we have pressure that runs pretty high in the city of Los Angeles, and in more places we have very low pressures. In moderate pressures we don't pay much attention to it at all. We have fastened valves with bell flanges to the ends of sheet iron pipes, and have used cement in such instances; did not require anything else but cement to hold the valves in place; we generally used the clear cement, making a solid joint of them. There is a straight plug and a tapered plug, but in the majority [83] of the city water works plugs they are tapered, with the small end in. They use those for lead joints so if they start pounding on them they would come out, but where they use cement, they use them just the same.

Q. Do you find difficulty at any time in separating joints made with cement?

A. Well, we haven't had very much occasion at cementing them. We have lowered pipe which we had to cut the cement out of to lower it. We had to cut the joint almost all out to lower the pipe; that is, we had a case of lowering some 36-inch pipe on Hoover Street, cast iron, that we had to cut the

(Testimony of John Mitten.)

cement mostly all out of the joint before it would move.

Q. Is there any danger of tendency to leakage in such joints?

A. Not until after the pipe would move. After the pipe would move, we would have to re-run them with lead.

Q. (By the COURT.) As a practical man, by what means is the cement filling put in these joints?

A. Your Honor, I don't understand how you refer.

Q. How do you get cement in there in a horizontal pipe now with the annular space also lying horizontal. How do you get cement in there?

A. I have always had the cement in one hand and caulked it back with a punch in the other hand. I do it by hand. There is no way of pouring it in. I have never seen it poured in. We used clear cement. but not dry cement, just damp, your Honor, so it would stick together, not too wet, and the men, they mixed the cement for us on the ditch, give it to us dry. We always had a can of dry cement down in the hole, down in the ditch, and make it to suit ourselves.

We have secured on some connections, gates or valves [84] upon the ends of pipes by cement. We have put them on by cement, lots of them, and fastened to the ends of cast-iron and sheet-iron pipes, anything that comes along.

The cement seems to hold equally well. It has proven faithful to our job.

(Testimony of John Mitten.)

This making of cement joints is not a new thing, no, not very new; I have been at it for the last ten years.

As to the holding power of cement on iron for ordinary pressure, it is all right: it is good; we made cement joints eight or nine years ago, and they are still in the ground yet.

On Cross-examination.

On our cast-iron pipe ends there is generally a bead, and the other end is a bell and spigot end. There is what we call a "lead lock." Inside the bell there is a sort of groove running around on the inside of the bell, a groove that lead will run into. I cannot remember any particular place within the last eight or ten years where this construction was used in Los Angeles; we have left lots of them there, but I don't know how long they stayed there without having pipe run on ahead of them. We have left jobs that way, you understand; I am not saying they were permanent jobs, but the water was turned into them until we come back to fix them over again—come back to put them on some more pipe, if that is what you are getting at.

I have not put on one of these valves without blocking it.

Not for a place in the system, but as an end we have put on what we call the dead end, run to a dead end. We have some valves on the dead ends, yes; that is what we call a valve, what you call a gate.

I remember we have put gates on dead ends. Of

(Testimony of John Mitten.)

course, [85] the city of Los Angeles has grown so fast they have not stayed there very long before some other gang might have come along and extended pipe further from that gate.

Q. Well, what I am talking about is a permanent dead end.

A. I don't suppose there is. At a permanent dead-end we would not put a valve on. A valve is a little too expensive to run to a dead-end and let it stay there.

As long back as I remember fastening a valve on the end of a pipe by means of a cement joint without block it, was only a short time ago; it is not over two months ago.

I can't just remember any such instance two years ago.

Q. Did you ever put a valve with a flange shape like that on the end of a pipe? (Indicating device.)

A. How do you mean? This would be on the valve, do you mean?

Q. Yes, put your pipe on the inside here, have a flange in this shape.

A. No, I never did.

Q. Would you think that would hold if it were placed on the end of a pipe and filled in with cement here a half an inch thick?

Q. (By the COURT.) Do you think it would hold under pressure?

A. Well, your Honor, it would depend how much pressure would be on that pipe. There is an awful short space there for material to hold there. Even

(Testimony of John Mitten.)

lead I would not gamble on it holding five minutes on a joint like that.

Q. You would be afraid it would blow off?

A. I would be afraid it would blow off; that is, there is not stock enough there—

Q. I understand what you mean, there is not enough [86] hold.

A. The majority of our bells are four inches or four and a half; that would give us four and one-half inches of cement or lead; and we can gamble on our joints; they hold pretty good.

Redirect Examination.

(By Mr. SEVERANCE.)

Q. The strength of such a joint would depend upon the size of the valve and the amount of cement?

A. The amount of cement you could get in there—

Q. Beg pardon.

A. I wouldn't gamble on a joint like that. I wouldn't recommend it at all. There is not enough stock to hold it to my idea.

Testimony of George Sidney Binckley (Recalled).

GEORGE SYDNEY BINCKLEY, recalled.

Redirect Examination.

(By Mr. SEVERANCE.)

Q. I want to draw to your attention complainant's exhibit valve, "Complainant's Commercial Valve" and ask you to—

A. I did not know at the moment—at the moment I did not know whether this was complainant's or defendant's valve.

(Testimony of George Sidney Binckley.)

Recross-examination.

(By Mr. MONTGOMERY.)

Q. Is there any additional element in the Crane valve that is not contained in the Kellar patent?

A. I presume that counsel refers to the groove on the interior of the bell in the Crane valve; that, however, is not an element which is recognized in the claim; it is not mentioned in the claim; and I would not consider that as an element in in the structure itself. It is a detail—a structural detail which may or may not have a [87] practical importance. It may have a function where used with lead; it undoubtedly has a function where used with cement; its function is questionable.

George C. Martin, for Plaintiff (in Rebuttal).

GEORGE C. MARTIN, called in rebuttal on behalf of plaintiff, testifies:

I have heard the testimony of Mr. Binckley. I don't agree with Mr. Binckley in the conclusions that he has drawn; I don't in fact, agree with the premise he starts with; I have examined the patents and my conclusion is just contrary from his, that instead of being anticipatory patents, the evidences of their uses our device superseded. I am simply explaining that from an examination of these patents, the conclusion I draw is that these were steps, some of them, at least, in an art which pointed in no ways at all to the step which we took, that the step which we took was a departure from any of the practices. For instance, what I mean by that, in this Hassall

(Testimony of George C. Martin.)

patent, the first one that was cited, this man says this pipe joint is very effective when the same is not exposed to much strain or pressure. Now, we have discovered—of course, that was in a pipe joint, that the practice is quite the contrary, that it makes a joint for a gate which is very effective.

Q. Yes, but at the same time, if the common bell and spigot connection were an old one, in the art, it would be impossible to get a patent on it.

A. Oh yes, of course, and my interpretation of our patent is not that it is a patent in any sense of the word upon a bell and spigot joint. Our patent is a patent on the combination of a gate, and I might say, I distinguish possibly—I would like to distinguish a little more clearly the difference between a gate and a valve, and a gate valve, concerning which a great deal of Mr. Binckley's testimony concerns.
[88]

Q. And yet the patent says there is no particular importance in the form of the valve, does it not?

A. Yes, but all of these patents—for instance, in the Crane, they are good samples, and in the city water department, and so forth, are what we describe and what we describe in the art and in commerce as a gate-valve; that is a by-pass valve, a valve in a continuous line, a bell end on both ends. In our patents, there must be several elements which are absent in those devices because we have a flange and opening, a pipe, cementitious filler, and a means for cutting off a water flow, and the cementitious

(Testimony of George C. Martin.)

filler comprising the means to hold the gate on, which is not the case with a gate-valve, because it remains in place in any event.

Q. Still the gate-valve must use the same elements or must use some additional elements?

A. That is just exactly the hole point which I meant to bring out. For instance, in these gate-valves it has been shown that the flanges in the gate-valves have been provided with grooves for either lead or cement. Now, the point is that the inventors who manufactured them did not, in fact, conceive that cement would hold as a filler without some additional means until Mr. Kellar's invention.

Q. That is so far as the patent art shows?

A. So far as the patent art shows, yes, or so far as the practice, all of the gates and hydrants used, Boynton's and Crane's and Fairbank's used a grooved gate.

All of these valves such as the Crane valve and the commercial valves of to-day are all and always have been provided with some means additional to a straight valve, or a valve with a cementitious filler for holding the valve onto the end of the pipe. Usually, as testified to by your witness, Mr. Mitten, both male and female ends are provided with means, the spigot end is usually provided with a bead around the end and the bell end with a groove as shown, in fact, in all of these. [89]

Q. Although he pointed out placing the valves equally well on these sheet metal pipes where they did not have a bead on the spigot end of the pipe.

(Testimony of George C. Martin.)

A. No, they have a bead there in the valve; as a matter of fact, I know from my knowledge of the art that they usually flare the end where they do that. These valves all show the grooved bell. I say they are also shown in the catalog.

Q. (By Mr. SEVERANCE.) Would you want to hold then that those devices even though they had some additional features and still had the same elements; would not infringe on your patent if they were subsequent to it rather than prior?

A. The use, for instance, of a gate-valve as the Crane gate-valve is not an analogous use to our use at all. We, ourselves, buy and sell Crane valves from Crane, but they are not used in line with out gates. The Crane valve as here depicted in the Crane catalog as introduced in evidence would not be an infringement of our patent. That sort of a valve wouldn't be put on the end of a line, it is a valve or gate that is to be inserted in a continuous line. The witness Mitten was talking about a stop at the temporary end of a line; until, as he suggested, another lot of workmen instructed to do so would come along and take it out and continue the line.

They put the valve end on the end of a line with the cement abutment or something back of it, so that they could continue the line at a later date. Of course, there it simply became a joint; obviously they wouldn't put a gate-valve in the end of a line and then plug up the hole.

It is stipulated that Plaintiff's Exhibit No. 6 may be introduced in evidence for the purpose of showing the cement standpipe; [90] the construction of it, to show the end of the pipe in which the former device was fitted, and over which now the present commercial device fits.

Sep. 13, 1916.

It is stipulated that the foregoing be approved by the Court under Equity Rule 75.

CHARLES C. MONTGOMERY,
Solicitor for Plaintiff.
FREDERICK S. LYON,
Solicitor for Defendants.

Approved:

EDWARD E. CUSHMAN,
District Judge.

[Endorsement]: No. B-65. United States District Court, Southern District of California, Southern Division. Kellar-Thomason Company, Plaintiff, vs. Frank P. Snow et al., Defendants. In Equity. Condensed Statement of Evidence Under Equity Rule 75. Filed Sep. 14, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk. Frederick S. Lyon. 504-7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Defendants. [91]

**Plaintiff's Exhibit No. 1—Certified Copy of Letters
Patent No. 1,016,159, Issued to George E. Kellar.**

No. 1,016,159

THE UNITED STATES OF AMERICA.

TO ALL TO WHOM THESE PRESENTS
SHALL COME:

WHEREAS, George E. Kellar, of Covina, California, has presented to the Commissioner of Patents a petition praying for the grant of letters patent for an alleged new and useful improvement in irrigating connections. He having assigned his right, title and interest in said improvement to Kellar-Thomason Manufacturing Company, of Covina, California, a corporation of California, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of law in such cases made and provided, and

WHEREAS, upon due examination made the said claimant is adjudged to be justly entitled to a patent under the law.

Now, therefore, these letters patent are to grant unto said Kellar-Thomason Manufacturing Company, its successors or assigns, for the term of Seventeen years from the thirtieth day of January, one thousand nine hundred and twelve, the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the city of Washington, this thirtieth day of January, in the year of our Lord, one thousand nine hundred and twelve, and of the Independence of the United States of America the one hundred and thirty-sixth.

[Seal]

C. C. BILLINGS,
Acting Commissioner of Patents. [92]

G. E. KELLAR.
IRRIGATING CONNECTION.
APPLICATION FILED OCT. 29, 1910

1,016,159.

Patented Jan. 30, 1912.

Fig. 1.

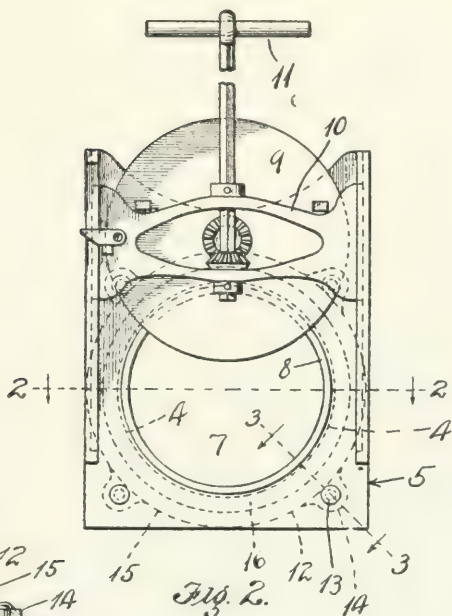


Fig. 3.

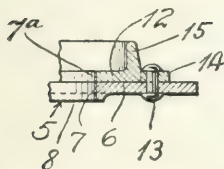
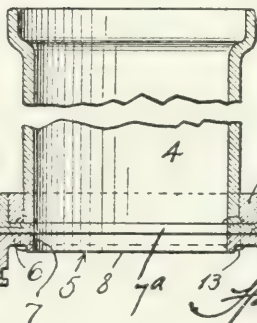


Fig. 2.



Witnesses.
E. P. Pellard
F. D. Amador

Inventor:
George E. Kellar.

By *Frank House*
Attys.

UNITED STATES PATENT OFFICE.

GEORGE E. KELLAR, OF COVINA, CALIFORNIA, ASSIGNOR TO KELLAR-THOMASON MANUFACTURING COMPANY, OF COVINA, CALIFORNIA, A CORPORATION OF CALIFORNIA.

IRRIGATING CONNECTION

1,016,159.

Specification of Letters Patent.

Patented Jan. 30, 1912.

Application filed October 29, 1910. Serial No. 589,653.

To all whom it may concern:

Be it known that I, GEORGE E. KELLAR, a citizen of the United States, residing at Covina, county of Los Angeles, State of California, have invented new and useful Improvements in Irrigating Connections, of which the following is a specification.

This invention relates to irrigating connections.

In irrigating systems pipes such as vitrified pipes are frequently used and on the end of the pipe a gate or valve is placed to control the flow of the water through the pipe. These pipes are of a simple form and constructed in sections so that the end of one section fits into the mouth of the next section. For this reason the end of the pipe is perfectly plain and of cylindrical form and on this account is not well adapted for attaching a gate or valve constructed of metal.

The object of this invention is to provide improved means for attaching a gate or valve to the end of such a pipe.

In the drawing forming a part of the annexed specification, Figure 1 is a front elevation of a gate which is attached to a pipe section in accordance with my invention. Fig. 2 is a horizontal section taken through the gate and through the pipe on the line 2—2 of Fig. 1, certain parts being broken away. Fig. 3 is a section taken on the line 3—3 of Fig. 1.

Referring more particularly to the parts 4 represents a section of vitrified pipe or similar pipe to the small end of which the gate 5 is attached. This gate 5 may be of any suitable construction comprising a face plate 6 having an opening 7 therethrough, around the edge of which a suitable seat 8 is formed for the disk 9 of the gate. This disk 9 is mounted on a slide 10 and is adapted to be operated by the handle 11 so as to come tightly upon the seat 8. The specific construction of the gate is immaterial for the purpose of this invention, how-

ever, except that the invention is applicable to gates having a face plate 6 as described.

In order to attach the gate to the pipe 4 I attach a ring 12 to the rear side of the face plate by means of suitable fastening devices or rivets 13 passing through lugs 14 provided on the ring for this purpose. This ring has an opening 7^a adapted to register with the opening 7 and at its outer edge the ring has an outwardly projecting flange or bead 15. The openings 7 and 7^a are of the same diameter as the inner diameter of the pipe.

In attaching the gate to the pipe the end of the pipe is placed against the outer face of the ring 12 so that the bore of the pipe registers with the openings 7 and 7^a. The annular flange 15 is of enlarged diameter so that an annular space is formed between the end of the pipe and the flange. With the pipe applied to the gate in this position I fill this annular space with a filler 16 of cement or a similar composition, which is adapted to set and harden in place. After this cement 16 hardens the gate will be found to be securely fastened to the pipe for the cement attaches itself to the outer surface of the pipe and the inner surface of the flange 15.

What I claim is:—

A gate having a plate with an opening through which water may flow, a pipe having its end abutting against said plate adjacent to said opening, said plate having an outwardly projecting flange encircling the end of said pipe and forming an annular space between the end of said pipe and said flange, and a cementitious filler in said annular space securing said plate to said pipe.

In witness that I claim the foregoing I have hereunto subscribed my name this 18th day of October, 1910.

GEORGE E. KELLAR.

Witnesses:

F. D. AMMEN,
EDMUND A. STRAUSE.

[Endorsed]: No. B-65. Eq. Kellar-Thomason Co. vs. Frank P. Snow et al. Complainant's Exhibit No. 1. Filed May 17, 1916. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. Hazard & Strause, Patents, 639 Citizens Nat. Bank Bldg., Los Angeles, Cal. [95]

Plaintiff's Exhibit No. 4—Photograph.

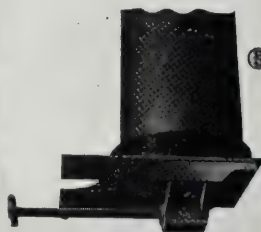
The "KT" Gate (Type P)

This gate is the same as our Type G Gate with a flange cast on the back for connecting to a concrete or vitrified pipe. The connection is made by filling the annular space between the flange and outside of the pipe with cement. This makes a substantial construction for use on high heads and is cheap and easily installed.

B-65-89
Kellum-Thompson &
Frank P. Snow & Co.
Exhibits Exhibited
No. 4
Filed May 17
1916
Wm. M. Evers Clerk
By J. J. Green Deputy



Back View of Type P Gate.



Type P Gate attached to joint of concrete pipe.

(22)

When better gates and valves are made, "KT" will make them.

Prices of "KT" Type P Gates

No.	Weight	Black
6.	24.0 lbs.	\$ 4.50
8.	40.5 lbs.	5.00
10.	45.0 lbs.	6.00
12.	65.0 lbs.	7.50
14.	89.0 lbs.	9.75
16.	120.5 lbs.	12.50
18.	140.5 lbs.	18.00

Prices F. O. B. Factory. Subject to change without notice.
Order by giving Type and Number.

Plaintiff's Exhibit No. 6—Photograph.



[Endorsed]: K. T. Co. vs. Snow et al. No. B-65-
Eq. Plffs. Exhibit No. 6. Filed May 18, 1916.
Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy
Clerk.

**Defendants' Exhibit "A"—Excerpts from Volumes
72 and 98, International Library of Technology.**

**Vol. 98—INTERNATIONAL LIBRARY OF
TECHNOLOGY**

§ 88, page 31, paragraph 32: "The joints in sewer pipe are made by the bell and spigot method, as for cast-iron water-pipe, the space being filled with cement of composition."

**Vol. 98—INTERNATIONAL LIBRARY OF
TECHNOLOGY,
Copyright 1907.**

§ 88, page 34, paragraph 35: "CEMENT JOINTS FOR SEWER PIPES." The joints in a sewer are the weakest part of the structure, because they allow the line to settle at the joint and thus may separate adjacent lengths of pipe. The joints are not water-tight, both because the joining material is pervious and because laborers seldom pack the joint full. For this reason, more or less water comes into the sewer in wet ground; this extra water taking up room, and if pumping of the sewage is necessary, largely increases the cost. In dry ground, on the other hand, the liquid leaks out and pollutes the soil, leaving the solids behind to choke up the sewer.

The usual joint is made of oakum and cement as shown in Fig. 13. The oakum packing, or gasket, is first laid around the spigot end as the latter enters the bell and is then tamped back to the bottom of the joint. The rest of the space is then filled with cement mortar mixed 1:1, enough mortar is pro-

vided at each joint to have it extend out on the pipe as shown. This cement should not be soft but rather moist, so that it can be tamped or rammed into the joint space thoroughly. For the triangular space outside, the cement is best put on directly, with the hands either bare or protected by rubber gloves.

Sometimes pipes are joined without a gasket, the entire space being filled with cement. In this case the mortar is spread in the socket on the inner surface as it lies in place in the trench. The spigot is then entered as high up as possible [97] pushed all the way back, and pressed down in the mortar. This method is more rapid, but the pipes are less likely to be concentric and there is more liability that the cement may work up into the inside of the pipe and form miniature dams against the flow."

Vol. 98, INTERNATIONAL LIBRARY OF TECHNOLOGY.

§ 85, page 17 and 18, paragraph 22: Partly quoted.

"The narrow end S of the pipe is called the spigot; the enlarged end AB the bell or hub. The spigot S of one length fits loosely into the bell of the other, the space RT being filled partly with oakum and partly with lead."

Vol. 72, INTERNATIONAL LIBRARY OF TECHNOLOGY.

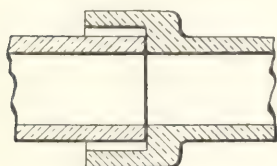
§ 47, page 25, last part of paragraph 48: "The house drain b should join the sewer above the line d, as shown. If there is danger of water backing up in the sewers, the mouth of b should be protected by a light hinged flap valve as shown."

Vol. 72, INTERNATIONAL LIBRARY OF TECHNOLOGY.

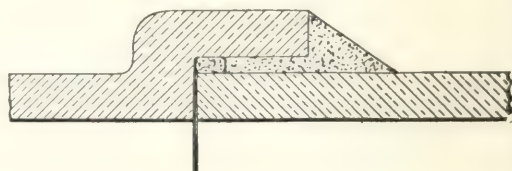
§ 47, page 52, paragraph 95: “Defective joints are probably the most common cause of chokage in earthenware drains. Fig. 27 shows one of them. The spigot end a should have been raised until the axis of the pipe was in line with that of the other. This would prevent the cement of which the joint is made, being pushed through, as at b and dripping to the bottom of the pipe, as at c, thereby forming an obstruction to the flow of the sewage.” [98]

Vol. 98 §88.

Page 32 Fig. 11

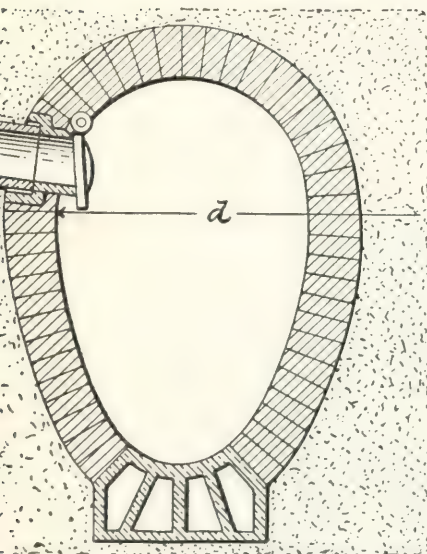


Page 34. Fig 13.

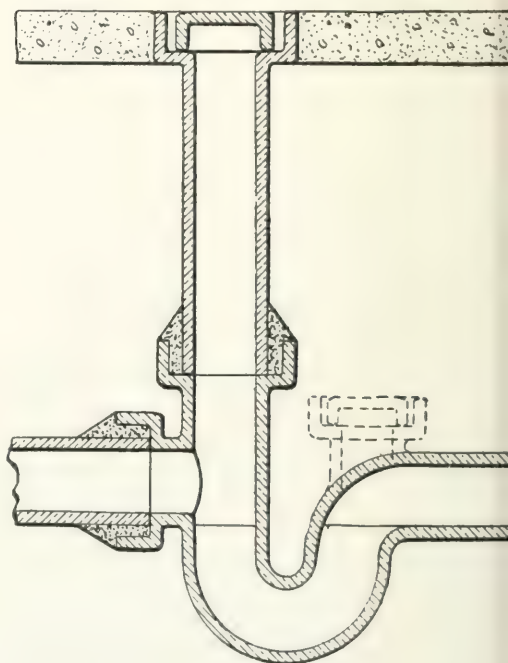


Vol. 72. §47.

Page 24 Fig. 6.



Page 45. Fig 22.



[Endorsed]: K. T. Co. vs. Snow et al. No. B-65
Eq. Defd. Exhibit "A." Filed May 17, 1916. Wm.
M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.

**Defendants' Exhibit "B"—Letters Patent Issued to
W. Hassall—Joint for Pipes for Water, Gas,
Electric Wires, etc.**

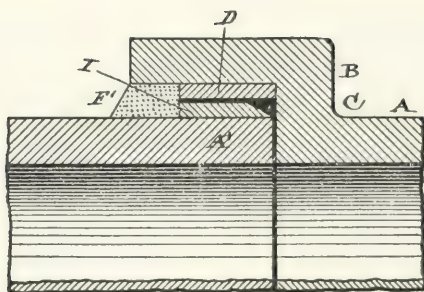
(No Model.)

W. HASSALL.

JOINT FOR PIPES FOR WATER, GAS, ELECTRIC WIRES, &c.

No. 318,616.

Patented May 26, 1885.



WITNESSES

Frederick N. Rosenbaum.
Carl Kark

INVENTOR

William Hassall
By his Attorneys
Georgel & Regener

UNITED STATES PATENT OFFICE.

WILLIAM HASSALL, OF BEESTON, COUNTY OF NOTTINGHAM, ENGLAND.

JOINT FOR PIPES FOR WATER, GAS, ELECTRIC WIRES, &c.

SPECIFICATION forming part of Letters Patent No. 318,616, dated May 26, 1885.

Application filed August 1, 1884. (No model.) Patented in England March 4, 1884, No. 4,457.

To all whom it may concern:

Be it known that I, WILLIAM HASSALL, of Beeston, in the county of Nottingham, Kingdom of England, have invented certain new and useful Improvements in Joints for Pipes for Water, Gas, Electric Wires, and the like, (for which I have received Letters Patent for Great Britain, dated March 4, 1884, No. 4,357,) of which the following is a specification.

10 This invention relates to an improved joint for water, gas, and sewage pipes, and for pipes for conveying compressed air, inclosing electric conductors, and other purposes.

15 The figure in the accompanying drawing is a vertical section of my improved pipe-joint. Similar letters of reference indicate corresponding parts.

20 In the drawing, A represents one pipe-section, which is provided with a socket, B, and a shoulder, C, at the inner end of the socket. A' is the adjoining pipe-section, the spigot end of which is inserted into the socket B and tightly fitted thereto by two concentric rings, D and I, which are either cast by means of a
25 cylindrical mold into the socket B and around the spigot end of the pipe A' or placed loosely therein, as desired. Between the adjoining surfaces of the rings D and I a plastic cement—such as mastic or like cement—is placed, by
30 which a tight joint is formed. The inner edge of the ring I is made beveled, so as to prevent the cement from being forced forward into the socket B when the pipes are being pressed together. The surplus cement fills the annular
35 space formed between the beveled edge of the

inner ring and the outer ring, as shown in the drawing. This pipe-joint is very effective when the same is not exposed to much strain or pressure.

In the drawing a ring or band, F', of Portland or other cement, is cast around the outer ends of the rings D and I, said ring closing the mouth of the socket. For metal pipes the rings may be respectively bored and turned in the lathe to insure accuracy.

45 For other pipes they may be made of earthenware or vitreous composition, vulcanite, or other suitable material, according to the purpose for which the pipe is required.

Having thus described my invention, I 50 claim as new and desire to secure by Letters Patent—

The combination of a pipe-section provided with a straight socket having a square shoulder at its inner end, a ring within said
55 socket concentric therewith, a spigot-section provided with an exterior ring adapted to fit within the socket-ring, the inner edge of said spigot-ring being beveled opposite the straight face of the socket-ring, and a ring or band of cement within said socket above said rings, substantially as described.

In testimony that I claim the foregoing as my invention I have signed my name in presence of two subscribing witnesses.

WM. HASSALL.

Witnesses:

WM. WHITTELEY,

M. SHAW,

Both of Nottingham.

[Endorsed]: K. T. Co., vs. Snow et al., No. B-65—
Eq. Defd. Exhibit "B." Filed May 17, 1916. Wm.
M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.

Defendants' Exhibit "C"—Letters Patent Issued to
T. & J. Galvin, for Hydrant.

(No Model.)

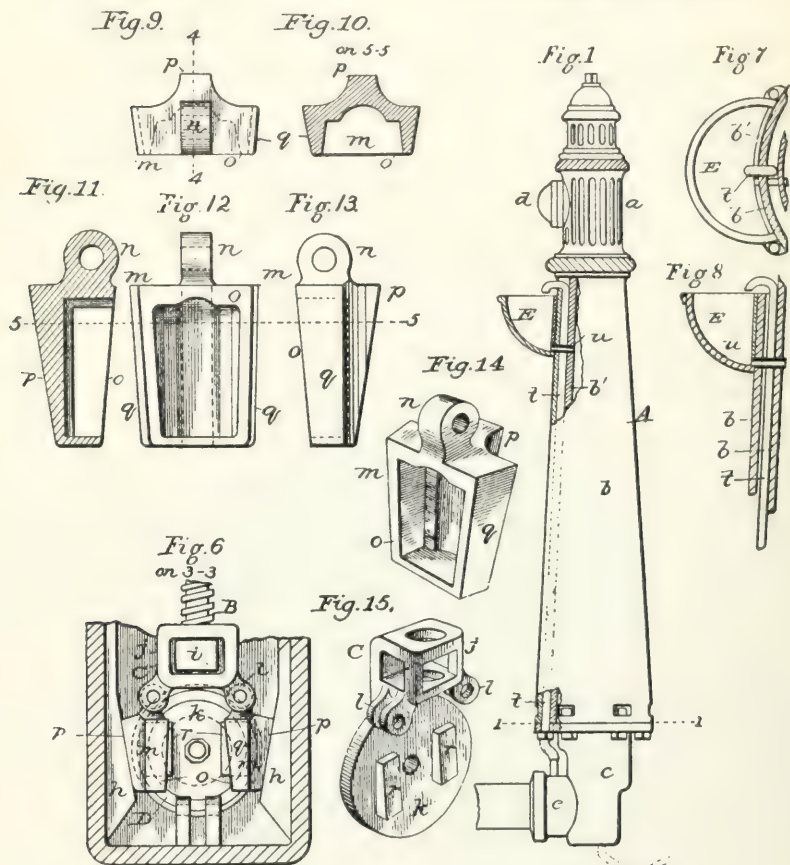
2 Sheets—Sheet 1

T. & J. GALVIN.

HYDRANT.

No. 337,945.

Patented Mar. 16, 1886.



Witnesses

James I. DeFamels
Walter I. Dodge

Inventors:

Thaddeus Galvin
John Galvin
by Rodgerdon
Attys

(No Model.)

2 Sheets—Sheet 2.

T. & J. GALVIN.

HYDRANT.

No. 337,945.

Patented Mar. 16, 1886.

Fig. 2.
on 1-1.

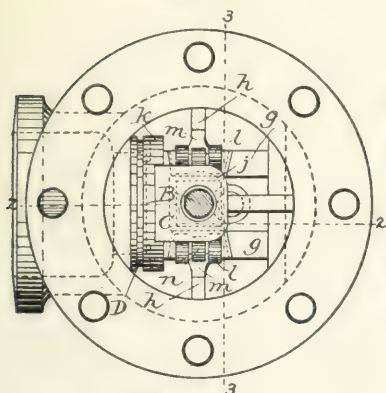


Fig. 3.
on 1-1.

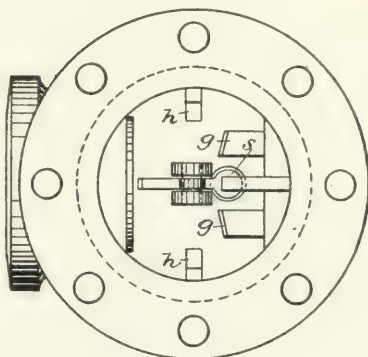


Fig. 4.
on 2-2.

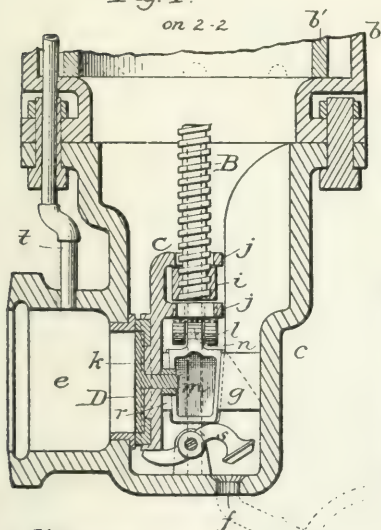
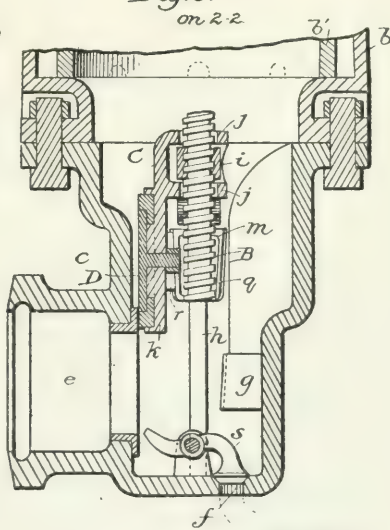


Fig. 5.
on 2-2.



Witnesses:

James J. DuHamel
Walter S. Dodge

Inventors:

Thaddeus Galvin,
John Galvin,
by Rodger Son,
their Attys

UNITED STATES PATENT OFFICE.

THADDEUS GALVIN AND JOHN GALVIN, OF DETROIT, MICHIGAN.

HYDRANT.

SPECIFICATION forming part of Letters Patent No. 337,945, dated March 16, 1886.

Application filed October 30, 1885. Serial No. 181,399. (No model.)

To all whom it may concern:

Be it known that we, THADDEUS GALVIN and JOHN GALVIN, of Detroit, in the county of Wayne and State of Michigan, have invented certain new and useful Improvements in Hydrants, of which the following is a specification.

This invention relates to hydrants; and it consists in various features hereinafter set forth.

In the drawings, Figure 1 is a side view, partly in section, of a hydrant constructed in accordance with our invention; Fig. 2, a horizontal section on the line 1 1; Fig. 3, a similar view with the gates of the valve removed; Figs. 4 and 5, sectional views on the line 2 2, Fig. 2, showing the valve open and closed; Fig. 6, a section on the line 3 3 of Fig. 2, showing the valve closed; Figs. 7 and 8, detail views of the drinking-basin; and Figs. 9 to 15 are views illustrating certain details.

The invention relates to the construction of the hydrant proper, the valve, and the drinking-basin.

Referring to the drawings, A, Fig. 1, indicates the hydrant proper, consisting of an upper section or cap, *a*, an intermediate chamber, *b*, and a lower or valve chamber, *c*, said parts being secured together by bolts, as shown, or in any other equivalent manner. The upper section or cap, *a*, may be made more or less ornamental in appearance, and is provided with a lateral outlet, *d*, and with a hole in its top, through which the valve-stem passes, as shown in Fig. 1. The intermediate section, *b*, is made tapering, largest at its base, so that the upheaval of the ground by the frost will not cause a similar movement of the hydrant.

The portion or section *b* is made of two thicknesses of metal, the inner shell, *b'*, containing the valve stem and rod and permitting access to the valve-chamber *c*, as shown in Figs. 1, 4, and 5.

The valve-chamber *c* is provided with a lateral supply-opening, *e*, and with an outlet or discharge opening, *f*, in its bottom, as shown in Figs. 3, 4, and 5. As shown in said figures, the interior of the valve-chamber is provided on its rear with two lugs, *g*, and on its side with lugs *h*, the faces of the lugs *g* and *h* being inclined, as shown in Figs. 2, 3, 4, 5, and 6.

B indicates the valve-stem, the lower end of

which is threaded and passes through a fixed nut, *i*, carried by a yoke or frame, C.

As shown in Figs. 4, 5, 6, and 15, the yoke C consists of a substantially-rectangular framing, *j*, in which the nut *i* is placed, and by which it is prevented from turning. The framing *j* projects laterally from a plate, *k*, to which is secured the sliding gate or disk D, the latter being attached to the yoke C in any usual or convenient manner. The upper and lower arms of the framing *j* are perforated to allow the screw-stem B to pass freely there-through.

From the lower arm, *j*, of the yoke C ears or lugs *l* project—two on each side—which ears are recessed, to render them light, but are so designed as to give the requisite strength, as will be seen by referring to the drawings. Their front and rear faces, *o p*, are tapering or beveled, as are also their side faces, *q*. As shown in the drawings, the rear face, *p*, is not as wide as the front face, *o*, but is of about the same width as the ear *n*; but this is not a matter of importance. The face *p* moves in contact with the incline *h*, and the faces *q* move between the inclined lug *g* and a lug, *r*, upon the face of the plate *k* of yoke C. From this construction it follows that as the screw-stem B is turned it causes the yoke C or its framing *j*, carrying the nut *i*, to descend or ascend, according to the direction of rotation. The nut *i* should be of such shape and size as to prevent its turning in the framing *j*.

Assuming that the screw-stem B be turned to the left, the yoke C and the wedges *m*, carried thereby, will descend, the latter striking against the inclines *g* and *h*, and being urged thereby toward each other and toward the orifice *e*. This action is such as to cause the gate D to be held tightly against the mouth of the inlet *e*, and thereby to secure a perfectly tight joint. As the valve-gate D descends and shuts off the water, its lower edge strikes against the tail of a pivoted valve-plug, *s*, and tips or raises the latter, thus allowing the waste water to escape through the opening *f*.

337,945

This also serves another purpose, as will be presently explained.

It is often desirable that a basin or drinking fountain be combined with the hydrant or plug, which basin shall be supplied from the same main as the hydrant. Such an arrangement is shown in Figs. 1, 7, and 8. Between the two shells *b b'* is a pipe, *t*, which connects with or is tapped into the lateral branch of the valve-chamber *c*, and which extends outward through shell *b* at its upper end, as shown. Cast with or attached to the front side of the shell *b* is a basin, *E*. A waste-pipe, *u*, connects the basin *E* with the interior of shell *b'* and discharges the water from the basin into the interior of the hydrant, where it falls into chamber *c* and is discharged through opening *f* into a sewer or other receiver. The supply of water to pipe *t* may be regulated or controlled by means of a valve placed in any convenient or desirable position. It is preferred, however, that the pipe *t* be made so small as to prevent any undue waste of the water when no valve is employed.

An advantage of the construction of the hydrant above set forth is that the entire valve mechanism can be moved bodily up and out through the upper end of the inner shell, *b'*, without removing the earth or the outer casing of the hydrant.

The outlet-pipe *u* may be omitted, and the waste water discharged into the space between the two shells *b* and *b'*. In that case it would be necessary to perforate the lower end of the shell *b'*, as indicated in dotted lines in Figs. 4 and 5, so as to allow the water to escape from between the two shells into the interior of the valve-chamber *c*, and thence through opening *f*; but the plan illustrated and above described is deemed preferable, because it insures a body of confined air between the external atmosphere and the water, and naturally lessens danger of freezing.

The valve-gate proper may be attached to the plate *k* by a joint permitting the gate to adapt itself to its seat.

We prefer to, and in practice do, construct the hydrant proper of only one tapering casing, the inner one, *b'*, being omitted, and we therefore do not wish to restrict ourselves to the use of the two concentric casings.

It will of course be understood that the main is laid below the frost-line, and that the

upheaval occurs only from said line upward. Now, to prevent the body or shell from being lifted with the earth, it is necessary that said body extend down to or below the frost-line, or that it extend very nearly thereto and be firmly secured to the main or the bend extending below said line, and it is likewise necessary that the portion of the shell or case which is below ground shall be tapered to such an extent as will insure the withdrawal of the earth therefrom as said earth rises.

Having thus described our invention, what we claim is—

1. A hydrant-body composed of two concentric shells, separated, as shown and described, in combination with a basin secured to the outer shell, a supply-pipe for said basin, between the shells, and a discharge-pipe connecting the basin and the interior of the hydrant-body.

2. In combination with chamber *c*, having lugs or inclines *g* and *h*, yoke *C*, consisting of frame *j* and plate *k*, nut *i*, carried by frame *j*, screw-stem *B* passing through nut *i* and frame *j*, gate *D*, carried by plate *k*, and pivoted wedges *m*, carried by the frame *j*, as shown.

3. In combination with chamber *c* and lugs *g* and *h*, yoke *C*, consisting of open frame *j*, plate *k*, and ears *l*, wedges *m*, pivoted in the latter, stationary nut *i*, carried by frame *j*, and disk *D*, secured to plate *k*, as shown.

4. The herein-described hydrant and drinking-fountain, consisting of a hydrant-body, a main gate controlling admission of water thereto, an outlet-opening from the interior of the hydrant-body, a valve controlling said outlet and adapted to be opened by the closing of the main gate, an external basin, a supply-pipe for said basin connected with the water-supply outside of the main gate, and a discharge-passage connecting the basin and the interior of the hydrant body.

5. In combination with hydrant-body *A*, inlet *e*, gate *D*, outlet *f*, pivoted valve *a*, basin *E*, supply-pipe *t*, and discharge pipe *u*, connecting the basin and the interior of the hydrant-body, all arranged as shown.

THADDEUS GALVIN
JOHN GALVIN

Witnesses:

JOHN W. STRACKBEIN.
W. S. ARMITAGE.

[Endorsed]: K. T. Co., vs. Snow et al., No. B-65—
Eq. Defd. Exhibit "C." Filed May 17, 1916. Wm.
M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.

**Defendants' Exhibit "D"—Letters Patent Issued to
H. H. Burritt for Valve.**

(No Model.)

H. H. BURRITT.
VALVE.

2 Sheets—Sheet 1

No. 515,514.

Patented Feb. 27, 1894.

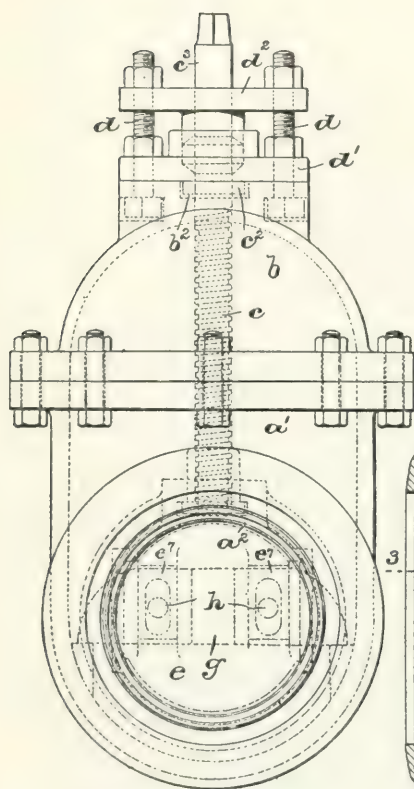


Fig. 1

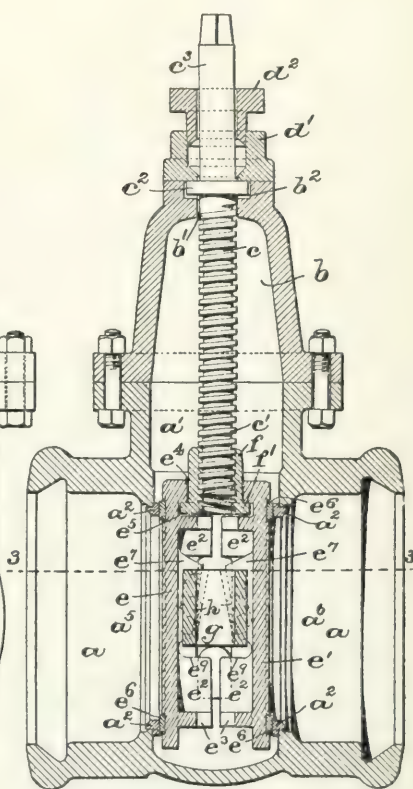


Fig. 2

WITNESSES:

Harvey H. Burritt,
Frederick Schuster.

INVENTOR:

Harvey H. Burritt,
BY *Frederick Schuster, ATT'Y.*

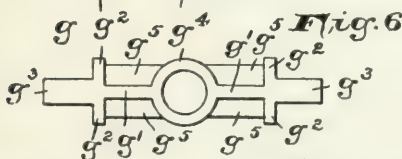
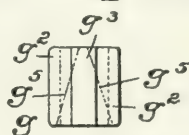
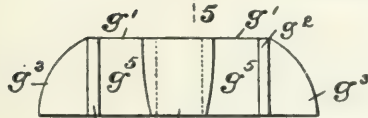
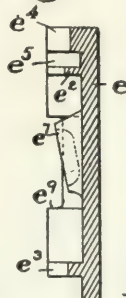
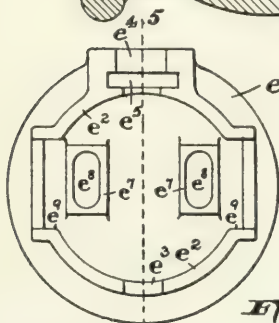
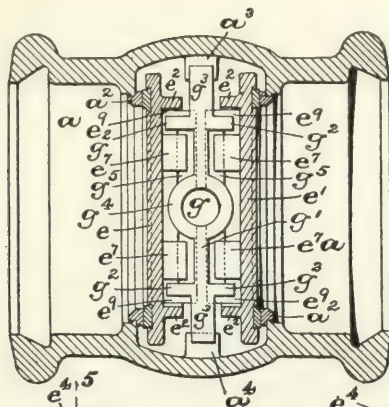
(No Model)

2 Sheets—Sheet 2.

H. H. BURRITT.
VALVE.

No. 515,514.

Patented Feb. 27, 1894.



WITNESSES:

Stro. marsh
Fred Schlueter

INVENTOR:

Harvey H. Burritt,
BY Fred C. Fraentzel, ATT'Y.

UNITED STATES PATENT OFFICE.

HARVEY H. BURRITT, OF NEWARK, NEW JERSEY, ASSIGNOR TO THE BURRITT MANUFACTURING COMPANY, OF NEW JERSEY.

VALVE.

SPECIFICATION forming part of Letters Patent No. 515,514, dated February 27, 1894.

Application filed July 28, 1893. Serial No. 431,697. (No model.)

To all whom it may concern

Be it known that I, HARVEY H. BURRITT, a citizen of the United States, residing at Newark, in the county of Essex and State of New Jersey, have invented certain new and useful Improvements in Valves; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to letters of reference marked thereon, which form a part of this specification

My present invention has for its primary object to provide a valve in which, by a slight movement, after the valve is closed, the valve disks are brought to firmly bear against their valve seats, whereby the valve is securely closed.

The invention therefore consists in the general construction of valve herein set forth, as a new article of manufacture, and also in certain novel arrangements and combinations of parts, such as will be hereinafter more fully set forth and finally embodied in the clauses of the claim.

In the drawings herewith accompanying, Figure 1 is an end view of my improved form of valve. Fig. 2 is a longitudinal vertical section of the same, and Fig. 3 is a horizontal section of the valve, taken on line 3—3 in said Fig. 2. Fig. 4 is a view of one side of one of the valve disks, and Fig. 5 is a vertical section of the same, taken on line 5—5 in said Fig. 4. Fig. 6 is a side view of a yoke or cross-bar used in connection with the valve disks in my present form of construction of valve. Fig. 7 is a top view of the same, and Fig. 8 an end view of said yoke or cross bar.

Similar letters of reference are employed in each of the above described views to indicate corresponding parts.

In said drawings, *a* represents the valve case; provided in the top with a suitable opening *a'* upon which is secured in any convenient manner a hollow cap *b*, having a perforation *b'*, which is suitably enlarged, as at *b²*, and as will be clearly seen from Fig. 2. In said perforation or opening *b'* of the cap *b* is rotatively arranged a valve stem *c* provided on its lower portion with a screw-threaded

portion *c'*. On said valve stem and loosely arranged in said enlarged portion *b²* of said opening or perforation *b'*, is an enlargement or collar *c²* formed integral with said valve stem, or said enlargement or collar *c²* may be made in the form of a ring which is slipped upon the stem *c* and then secured thereto in any convenient manner, as will be clearly understood. Secured to said cap *b* by means of suitable bolts *d*, see Fig. 1, is a perforated plate *d'* provided with the usual form of stuffing box *d²*, through which projects the end *c³* of the valve stem for raising or lowering the valve disks and thereby opening or closing the valve. Said plate *d'* which is secured to the top of said hollow cap *b*, forms, with said enlarged portion *b²* of the opening *b'*, a chamber in which said collar *c²* on the valve stem is retained, but is free to rotate therein. This allows of the valve stem *c* to be freely turned in either direction, but prevents the stem from moving upward or downward and holds the stem at all times in its proper position. On the lower end of said screw-threaded valve stem *c*, I have arranged a screw-threaded sleeve *f* provided with a square or angular flange *f'*. In said valve casing *a*, as will be seen from Figs. 2 and 3, are arranged the valve disks *e* and *e'*, each of which is formed on its inner surface, with the inwardly projecting flange *e²*, substantially as illustrated more especially in Fig. 4. Said flanges are provided at the bottom with the grooved portions *e³* and at the top with the grooved portions *e⁴* and the recessed portions *e⁵*, which portions *e³* and *e⁴*, when the said valve disks are in position in the valve case, form openings for the valve stem *c*, while the flange *f'* on the sleeve *f* fits into the recessed portions *e⁵* which prevent said sleeve from turning with said screw *c*, and, when the valve stem is turned, said sleeve which moves up and down upon the screw-thread of the said stem, causes the valve disks *e* and *e'* to be raised or lowered, as the case may be. Each valve disk is provided with a suitable ring *e⁶*, of non-corrosive metal, which forms the face of the disk, said rings *e⁶* coming in close contact with rings *a²* in said valve case, as will be clearly seen from Fig. 3.

Each valve disk *e* and *e'* is provided with

515,514

suitable lugs e' which incline toward the bottom, as will be evident from Figs. 2 and 5, and are hollowed to form an oblong recess e'' in each, as shown more especially in Fig. 4.

5 Arranged between said valve disks e and e' is a yoke or cross bar g , as clearly shown in Fig. 3, and said yoke or cross bar is provided with a central longitudinal rib g' having a centrally arranged opening or hole, as shown

10 in Fig. 7. Near both ends of said rib g' are oppositely projecting arms g'' from which extend longitudinally with said rib g' suitable supports g''' . Between said arms g'' and the collar g^4 formed around said central opening

15 in said yoke or cross bar g are arranged the inclined webs or portions g^5 , as is clearly shown in the plan view in Fig. 7, and as is indicated in dotted outline in Fig. 8. In said valve case a are two oppositely placed lugs

20 or ears a^3 and a^4 , as clearly shown in Figs. 1 and 3, and the purpose of which will be more clearly described hereinafter. Loosely and movably arranged in said oblong recesses in said lugs e' and riding on the said inclined

25 webs g^5 of said yoke or cross bar g , are small balls or rollers h , as indicated in dotted outline in Figs. 1 and 2, which balls or rollers are made of any suitable hard metal, and may be tempered and coppered to prevent

30 them from rusting.

The operation of the device is as follows:—When the valve is closed, as is clearly shown in Fig. 2, said supports g''' of the cross bar or yoke g rest upon the lugs or ears a^3 and a^4

35 in the valve casing, while the balls or rollers h are tightly wedged in between the inclined webs g^5 of the said cross bar or yoke and the recesses e'' in each disk e and e' . Now, when the valve stem c is turned to raise the valve

40 disks, said sleeve f moves upwardly on the screw-thread c' , whereby said plates are raised, and by bringing the edges e^3 of the herein above mentioned flanges e^2 in contact with the lower edges of the supports g''' on the bar

45 or yoke g , the latter is raised with the disks e and e' to a position within the chambered cap b , thereby permitting a free passage for the water or other liquid to be conveyed through the valve, as will be clearly understood.

50 When the valve stem is turned to close the valve, said disks e and e' and also the yoke or bar g move downwardly, and when the disks have been lowered to such a point that they nearly close the openings a^5

55 and a^4 in the valve case a , the supports g''' on said bar or yoke will come in contact with the lugs a^3 and a^4 in the valve case, thus holding said bar or yoke in this position. At the same time the disks are permitted to travel still

60 further in their downward course, but said balls or rollers h in the oblong recesses e'' will ride on said inclined webs g^5 of the bar or yoke g , whereby said valve disks e and e' are forced forwardly in opposite directions, causing their facing rings e^2 to closely bind against

65 the rings a^2 in the valve casing a , whereby the valve is firmly closed. Of course it will

be evident that I can dispense with the use of said balls or rollers h , in which case the inclined lugs e' will ride directly upon the inclined webs g^5 , as will be clearly understood; but I prefer to use the balls or rollers h , as in that case there is less friction, and the parts are less liable to rust and stick when the valve has not been used for sometime. It will thus

75 be seen that the mechanism is extremely simple and not liable to get out of order, and the several parts can be easily removed for repairs, when necessary.

Of course it will be evident that certain 80 changes in the arrangement and combinations of parts may be made without departing from the scope of my invention, and I therefore do not wish to limit my invention to the exact form and construction of valve herein shown.

85

The mechanism herein shown and described is especially well adapted for different classes of valves and especially gate valves, and is also well adapted for the use of valves in hydrants.

90

Having thus described my invention, what I claim is—

1. In a valve, the combination, with the chamber thereof, of the two-part valve, consisting of valve disks e and e' , each provided with a pair of downwardly inclining lugs having oblong recesses therein, balls or rollers in said recesses, and a bar or yoke between said disks, said bar or yoke having a central opening formed by a collar g^4 , longitudinally

100 arranged ribs extending on opposite sides from said collar, and a pair of inclined webs g^5 on each side of said ribs, against which said balls or rollers ride, substantially as and for the purposes set forth.

105

2. In a valve, the combination, with the chamber thereof, of the two-part valve disks e and e' , each provided with a pair of downwardly inclining lugs having oblong recesses therein, balls or rollers in said recesses, and

110 a yoke or bar between said valve-disks, having inclined ribs against which said balls or rollers ride, substantially as and for the purposes set forth.

3. In a valve, in combination, with the valve case, provided with oppositely placed lugs or ears a^3 and a^4 , a screw-threaded valve stem, a pair of valve disks, a yoke or bar between said disks adapted to be supported by said lugs or ears a^3 and a^4 , when the valve is closed, and said bar or yoke being adapted to be raised by said disks when the valve is being

120 opened, and means on said bar or yoke and said valve disks for forcing said valve disks forward in opposite directions when the valve is nearly closed, said means consisting essentially of inclined lugs on said valve disks, having oblong recesses, balls or rollers in said recesses, and inclined webs on said bar or yoke, against which said balls or rollers ride, substantially as and for the purposes set forth.

130

4. The herein described valve, comprising therein a valve casing a , a chambered cap b , a screw-threaded stem c , a sleeve f having a

flange f' , valve disks e and e' engaging with said flanged sleeve f and adapted to be raised thereby when said valve stem is turned, and means, connected with said valve disks for forcing said disks forward in opposite directions when the valve is nearly closed, said means consisting essentially of inclined lugs on said valve disks, having oblong recesses, balls or rollers in said recesses, and a bar or yoke g having inclined webs against which said balls or rollers ride, substantially as and for the purposes set forth.

5 The herein described valve, comprising therein a valve casing a , a chambered cap b , a screw-threaded stem c , a sleeve f having a flange f' , lugs a^3 and a^4 in said valve casing, valve disks e and e' engaging with said flanged sleeve f adapted to be raised thereby when said valve stem is turned, a yoke or bar be-
 10 tween said valve disks adapted to be sup-

ported by said lugs a^3 and a^4 , when the valve is closed and said bar or yoke being adapted to be raised by said disks when the valve is being opened, and means on said bar or yoke and said valve disks for forcing said valve disks forward in opposite directions when the valve is nearly closed, said means consisting essentially of inclined lugs on said valve disks, having oblong recesses, balls or rollers in said recesses, and inclined webs on said bar or yoke, against which said balls or rollers ride, substantially as and for the purposes set forth.

In testimony that I claim the invention set forth above I have hereunto set my hand this 26th day of July, 1893.

HARVEY H. BURRITT

Witnesses:

FREDK. C. FRAENTZEL,
 FRED SCHLUETER.

[Endorsed]: K. T. Co., vs. Snow et al., No. B-65-Eq. Defd. Exhibit "D." Filed May 17, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.

**Defendants' Exhibit "E"—Letters Patent Issued to
C. H. & E. H. Bentley, for Pipe Joint for
Earthenware, etc.**

PATENTED JULY 31, 1906.

C. H. & E. H. BENTLEY.

PIPE JOINT FOR EARTHENWARE, &c.

APPLICATION FILED NOV. 24, 1905.

FIG. 1.

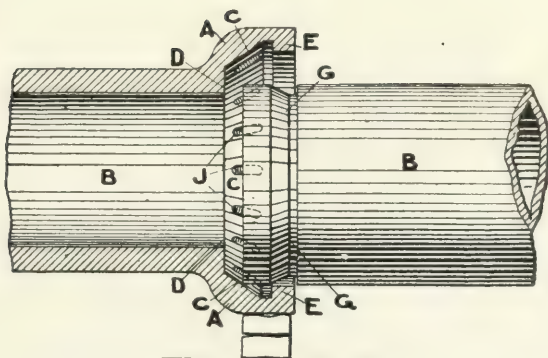
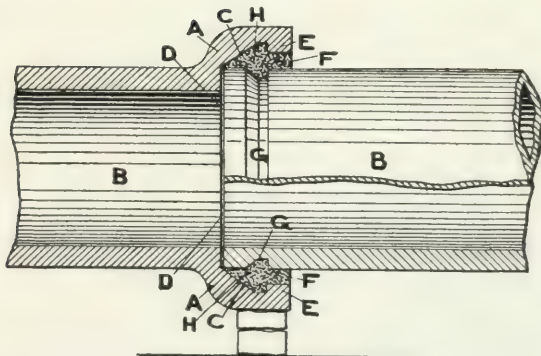


FIG. 2.



WITNESSES

Wm. Rud
Wilfred Alderson

INVENTORS

Charles Henry Bentley
Ernest Haigh Bentley
per John B. Walsh
Attorney

UNITED STATES PATENT OFFICE.

CHARLES HENRY BENTLEY AND ERNEST HAIGH BENTLEY, OF HALIFAX,
ENGLAND.

PIPE-JOINT FOR EARTHENWARE, &c.

No. 827,409.

Specification of Letters Patent.

Patented July 31, 1906.

Application filed November 24, 1905. Serial No. 288,961.

To all whom it may concern:

Be it known that we, CHARLES HENRY BENTLEY and ERNEST HAIGH BENTLEY, subjects of the King of Great Britain, residing at Halifax, in the county of York, England, have invented new and useful Improvements in Pipe-Joints for Earthenware and other Suitable Pipes, of which the following is a specification

This invention is more particularly applicable to earthenware pipes, but is equally suitable for gas or water pipes; and our object is to construct a joint for these pipes which is self-adjusting to a correct alinement, can be more easily and quickly laid, may be laid by unskilled labor, and while rendering leakage impossible the making of said joint greatly strengthens the pipe at this part. We attain these objects in the manner illustrated in the accompanying drawings, in which—

Figure 1 is an elevation, partly in section, of our improved pipe-joint, showing the insertion of the spigot end of pipe preparatory to adjustment. Fig. 2 is a similar view to Fig. 1, but with the spigot end in position and the joint completed.

Similar letters refer to similar parts throughout both the views.

In constructing our improved joint we form the socket A of each pipe B with an inner conical or taper face C, having a straight bed or seating D at its narrowest part, so that when the next length of pipe is joined up its inner surface is flush with or in alinement with that of the pipe already laid. (See Fig. 2.) Also the socket A is further provided with an inner flange or rim E, sufficiently deep yet permit of the ready insertion of the spigot end of the next pipe and provide the required clearance or opening F for the introduction of the binding material.

At the spigot end of each pipe is a suitable annular recess or neck G of a shape or section corresponding with the taper or inner face C of socket, so that when two pipes are in position an annular chamber, miter, dovetail, or arrow-head in shape or section encircles the spigot end. This chamber is filled with cement, lead, or other binding material H. Grooves J are provided in the socket to equalize and counteract the effect of any

contraction of the binding material and prevent the same from twisting loose.

The taper or conical face C also serves to guide the spigot end onto its seat upon inserting the pipe. (See Fig. 1.) The pipe end bears against said face and slides up onto its seat D. When no further forward movement is possible, the pipe is butt up and ready for the cement or other filling.

The clearance or space F between the inner flange or rim E in the socket and the spigot end of pipe being less than the cement-chamber at its greatest diameter, the binding material when set renders any subsequent movement of the pipes in any direction an impossibility. Therefore a perfect joint of great strength and as durable as the pipes themselves is obtained. Further, there is no possibility of spigot dropping when laying or fixing the pipes, as the taper face in the socket supports the spigot end until the filling has been applied and the joint completed, and as the said spigot end also abuts against its seating D no cement or other filling can pass into the pipes.

What we claim as our invention, and desire to secure by Letters Patent, is—

The combination, with a pipe-section having a socket provided with a flat surface D at its bottom, an internally-projecting flange E at its top, and a conical surface C arranged between the said surface and flange and provided with longitudinal grooves; of a cylindrical pipe-section having no bead or projection but having a circumferential groove having a conical side and a straight side, said conical side being opposite the conical surface C and said straight side being in line with the inner edge of the flange E when the end of the pipe abuts against the flat surface D, a packing-space being formed which is narrower between the said flange and pipe than between the bases of their said conical surfaces.

In testimony whereof we have hereunto affixed our signatures in the presence of two witnesses.

CHARLES HENRY BENTLEY.
ERNEST HAIGH BENTLEY.

Witnesses:

A. REED,
WILFRED ALDERSON.

[Endorsed]: K. T. Co., vs. Snow et al., No. B-65-
Eq. Defd. Exhibit "E." Filed May 17, 1916. Wm.
M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.

**Defendants' Exhibit "F"—Letters Patent Issued to
A. Wakefield for Sanitary or Other Pipe.**

No. 608,239.

Patented Aug. 2, 1898.

A. WAKEFIELD.
SANITARY OR OTHER PIPE.
(Application filed Oct. 18, 1897.)

(No Model.)

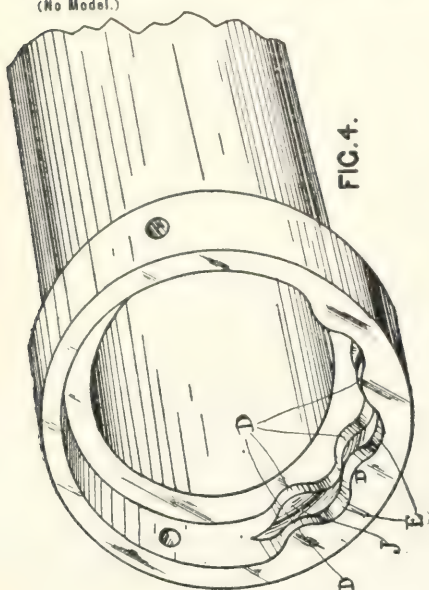


FIG. 4.

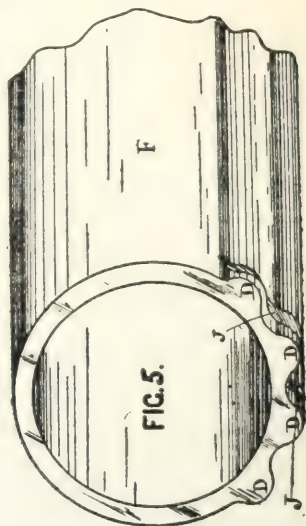


FIG. 5.

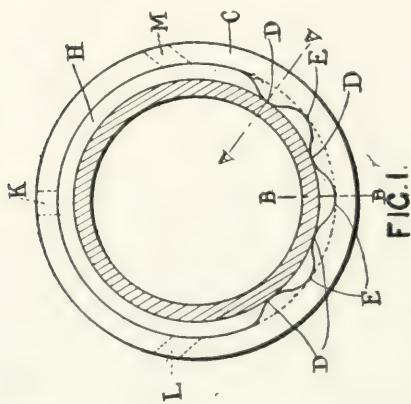


FIG. 1.



FIG. 3.



FIG. 2.

INVENTOR

WITNESSES.

Harry Lee.
James Lewis

BY

Arthur Wakefield.

Sanbury & Plummer

ATTORNEYS.

UNITED STATES PATENT OFFICE.

ARTHUR WAKEFIELD, OF LONDON, ENGLAND.

SANITARY OR OTHER PIPE.

SPECIFICATION forming part of Letters Patent No. 608,239, dated August 2, 1898.

Application filed October 18, 1897. Serial No. 655,591. (No model.)

To all whom it may concern:

Be it known that I, ARTHUR WAKEFIELD, of 39 Victoria street, Westminster, London, England, have invented certain new and useful Improvements in Sanitary or other Pipes; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

In laying enormous lengths of socketed earthenware sanitary pipes it is difficult to maintain a true level or gradient throughout the entire length by reason of the bedding of the spigot end of the following pipe in the socket being imperfect, there being no absolutely solid and unyielding point or points on which the said spigot end may rest, the usual bed being either cement or a strand of hemp or the like embedded in clay or otherwise or other equivalent devices.

Now the object of my invention is to so form the socket of the pipe that the spigot end of the next pipe may have certain and fixed points of support in addition to the usual cement or other bedding or filling, so that a true and effective level or grade may be secured for the invert. I attain this object by molding the pipe to a special shape (whether molded in plastic material or cast in a mold) according to either one or the other of the two forms shown upon the accompanying drawings, in which—

Figure 1 is an end view of the socket of a pipe prepared according to the form of my invention which I prefer to employ, together with a cross-section of the spigot end of the following pipe; Fig. 2, a section through line A A, and Fig. 3 a section through line B B, of Fig. 1. Fig. 4 is a perspective view of this form of pipe, showing corrugations and a transverse furrow within the socket. In Fig. 5 I have illustrated the alternative form of my invention by a perspective view of the spigot portion bearing longitudinal corrugations on its outside crossed by a transverse furrow near to the extremity.

I mold the bedding or lower portion of the socket C of the pipe into a series of short corrugations E E E, running in the direction of the length of the pipe—say to the number of three or more—the points or ridges D D D D

formed by such corrugations E E E rising to a circumferential line corresponding with the lower or outer circumference of the spigot F, thus forming points D D of certain and unyielding support for the same, the bed now presenting a ridge-and-valley formation. The operation so far may be easily accomplished in an ordinary pipe-mill by suitably shaping the die of the socket-mold to produce the required corrugations. The internal face of the corrugations at their lowest points will correspond with the usual contour of the socket, the remainder H of which, together with the valleys E E E of the corrugated portion, is filled with cement in the usual way for the purpose of making a close joint. After the pipe (assuming it to be of plastic material) has left the mold I cut or plow through the ridges formed, as before described, with a transverse or circumferential furrow J, Figs. 2 and 4, (or more than one furrow,) so leaving a number of certain points—say eight or more—on which the spigot end may rest, and is thereby prevented from sinking into the cement which forms the bedding and surrounds the spigot end.

It is obvious that if the pipe is to be made by casting the furrow J must be produced by the mold simultaneously with the pipe itself.

For the purpose of more readily pouring in the cement filling, and so making an effective joint, I form, say, three holes in the socket, one, K, at the crown and one at each side, L M, at about one-third of the depth of the pipe, or thereabout, and when several pipes are duly laid in position and clayed up I pour in the liquid cement through the two side holes, or one of them, until the space is filled up to the position of the said side holes, which are then clayed up, and when the cement is set, or nearly so, I fill up the remaining portion through the hole in the crown, thus insuring a thorough joint without the use of mastic or other linings.

According to the alternative form of my invention instead of corrugating the socket, as before described, I may leave the socket plain and corrugate the lower portion or one side of the outer surface of the pipe throughout the whole or a portion of its length (or the whole outer surface of the pipe may be corrugated, if desired) and transversely corrugate

the spigot end of these corrugations to obtain a similar result, as shown by Fig. 5.

Having now described my invention, what I claim as now, and desire to secure by Letters Patent, is—

1. In earthenware and like sanitary pipes a horizontally and internally corrugated (or partially-corrugated) socket having the ridges of such corrugations furrowed centrally or thereabout in the transverse or circumferential direction of the socket substantially as set forth in the foregoing specification.

2. A sanitary or other like pipe having a

horizontally-corrugated or partially-corrugated socket furrowed transversely or circumferentially and provided with three holes namely one at the crown and one at each side for pouring in cement substantially as hereinbefore set forth.

In testimony whereof I affix my signature in presence of two witnesses.

ARTHUR WAKEFIELD.

Witnesses:

JAMES LEWIS,

HARRY GEE.

[Endorsed]: K. T. Co., vs. Snow et al., No. B-65-Eq. Defd. Exhibit "F." Filed May 17, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.

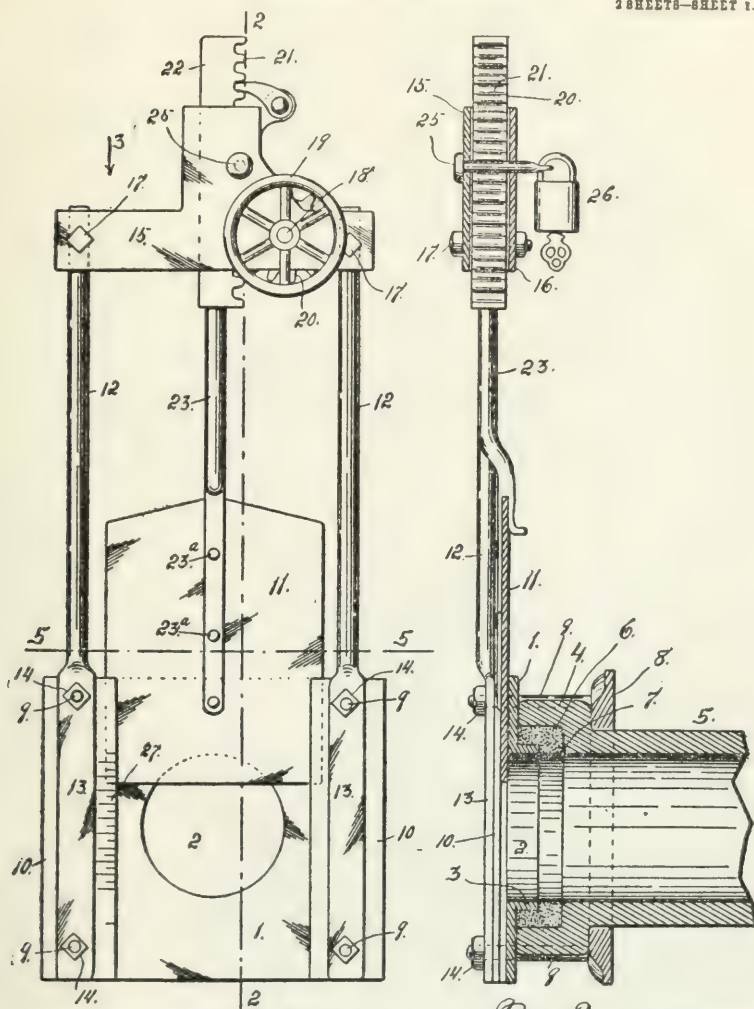
Defendants' Exhibit "G"—Letters Patent Issued to
C. W. Seitz, for Irrigating Headgate.

[No. 779,973.

PATENTED JAN. 10, 1905.

C. W. SEITZ.
IRRIGATING HEAD GATE.
APPLICATION FILED AUG. 24, 1904.

28 SHEETS—SHEET 1.



Witnesses
Otto E. Hordick
Dana Nelson.

Fig. 1

Fig. 2

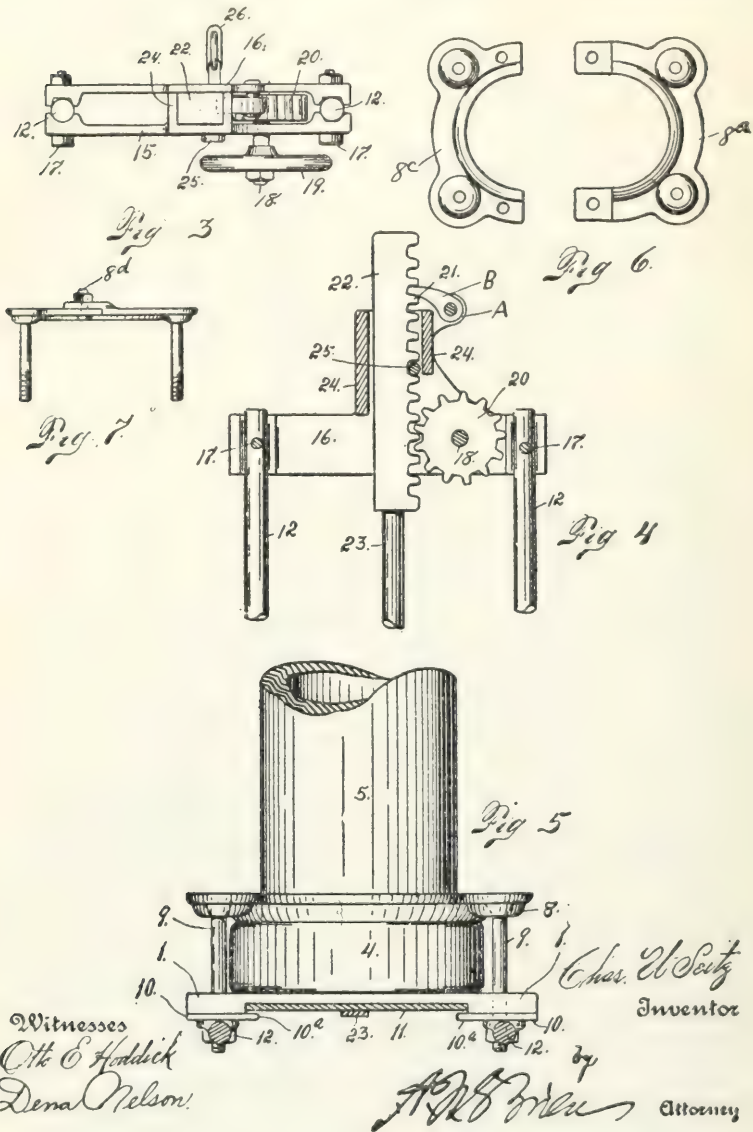
Inventor
C. W. Seitz.
by *[Signature]* Attorney

No. 779,973.

PATENTED JAN. 10, 1905.

G. W. SEITZ.
IRRIGATING HEAD GATE.
APPLICATION FILED AUG. 24, 1904.

2 SHEETS—SHEET 2.



UNITED STATES PATENT OFFICE.

CHARLES W. SEITZ, OF DENVER, COLORADO.

IRRIGATING HEAD-GATE.

SPECIFICATION forming part of Letters Patent No. 779,973, dated January 10, 1905.

Application filed August 24, 1904. Serial No. 221,946.

To all whom it may concern:

Be it known that I, CHARLES W. SEITZ, a citizen of the United States, residing in the city and county of Denver and State of Colorado, have invented certain new and useful Improvements in Irrigating Head-Gates; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to the figures of reference marked thereon, which form a part of this specification.

My invention relates to improvements in head-gates more especially intended for use in connection with irrigation where water is taken out of the main ditch into a branch ditch or lateral for use by consumers whose land is located along or adjoining the main ditch or canal.

My object is to provide a device of this class which shall be simple in construction, economical in cost, reliable, durable, and efficient in use; and to these ends the invention consists of the features, arrangements, and combinations hereinafter described and claimed, all of which will be fully understood by reference to the accompanying drawings, in which is illustrated an embodiment thereof.

In the drawings, Figure 1 is a front view of my improved device or a view looking toward the side which is next to the ditch or canal when the device is in use. Fig. 2 is a vertical section taken on the line 2 2, Fig. 1, showing the device attached to the conduit through which the water passes from the ditch or canal. Fig. 3 is a top view looking in the direction of the arrow 3 in Fig. 1. Fig. 4 is a view of the upper part of the device with one member of the frame removed, while the other is shown partly in section. Fig. 5 is a section taken on the line 5 5, Fig. 1, looking downwardly. Fig. 6 is a detail view illustrating a modified form of clamping-plate construction, the two members being shown separated. Fig. 7 is a top view of the same with the members connected.

The same reference characters indicate the same parts in all the views.

Let the numeral 1 designate a suitable plate provided with a centrally-located opening 2,

which is surrounded by a flange 3, which is surrounded by the bell 4 of the conduit 5 when the device is connected with the said conduit. The term "bell" as here used consists of an enlargement at one extremity of the pipe-section. Between the bell of the conduit and the flange 3 is a space filled with cement or other suitable packing material 6 for the purpose of making a water-tight joint. The bell or enlargement 4 of the conduit is considerably deeper or longer than the flange 3 of the plate, leaving a space between the free extremity of the flange 3 and the body of the conduit or the extremity where the bell or enlargement 4 begins. This space is designated 7 in Fig. 2 and is of sufficient width to allow the putting of the cement 6 or other packing material in place after the conduit has been connected with the plate 1.

A clamping-plate 8, provided with bolts 9, coöperates with the plate 1 in forming the connection between the head-gate and the conduit 5. The plate 8 engages the bell of the conduit on the outside and occupies a position opposed to the plate 1, which the free edge of the bell engages. The bolts 9, which, as shown in the drawings, are connected with the plate 8 at the time the latter is cast, pass through the outer edge of the plate 1 and through metal strips 10, which occupy positions on opposite sides of the gate proper, 11, and overlap the edges of said gate, as shown at 10^a. The outer edges of the plate 1 are reinforced, and the edges of the gate 11 occupy positions adjacent the offset formed by the reinforcement. Hence the overlapping part 10^a coöperates with the plate 1 to form ways in which the vertical edges of the gate are free to move vertically. To the strips 10 are secured vertical bars 12, whose lower extremities are flattened, as shown at 13, and connected with the strips and also with the plate 1 by means of the bolts 9 and nuts 14, which are applied to the threaded extremities. The upper extremities of the rods or bars 12 pass between the outer extremities of two plates 15 and 16, the said plates being connected with the bars by bolts 17, which pass through the plates and bars 12, the latter being provided with registering apertures for

the purpose. In the plates 15 and 16 is journaled a spindle 18, provided with a hand-wheel 19 and a pinion 20, the latter meshing with the cogs 21 of a rack-bar 22, made fast to the upper extremities of the stem 23 of the gate proper, 11. The lower extremity of this stem is secured to the gate by suitable fastening devices, as rivets 23^a. The plate 15 is provided with vertical separated flanges 24, which extend to the plate 16 and form a guide-way for the rack-bar 22.

The two plates 15 and 16 are provided with registering openings in line with the cogs 21 of the bar 22, through which a locking-pin 25 may be passed. This pin when in place passes between two of the cogs of the rack-bar and locks the gate in any desired position of adjustment. One extremity of the pin is apertured to receive the hasp of a padlock 26. It is evident that when this pin is in position and the lock is applied the vertical position of the gate can only be changed by a person holding the key to the lock.

The inner edge of one of the strips 12 is graduated adjacent the gate, as shown at 27, to facilitate the adjustment of the gate. These graduations may be such as to determine the quantity of water which will pass through the opening 2 into the conduit 5 when the gate proper is in any position of vertical adjustment.

From the foregoing description the use and operation of my improved device will be readily understood. In applying the device to the conduit 5 the plate 8 is of course detached from the plate 1. The bell of the conduit 5 is placed in position against the plate 1 and surrounding the flange 3 of the said plate. The clamping-plate 8 is then slipped over the end of the section of the conduit and moved up against the exterior shoulder of the bell of the conduit. When in this position, the bolts 9 protrude through the openings in the plate 1 and the strips 10 coöperate therewith, as heretofore described. Nuts are then applied to the rods, whereby the extremity of the conduit is securely held in place, my improved device being clamped thereto. The cement or other packing 6 is then put in place and allowed to stand until it is properly set or fixed. The gate may then be raised by turning the hand-wheel 19, whereby the water is allowed to pass through the opening 2 into the conduit in any quantity desired. After the gate has been properly adjusted the pin 25 is put in position and the padlock 26 applied, when the gate will be held in the desired position until the holder of the key wishes to change it.

In the form of construction shown in Figs. 6 and 7 the clamping-plate is composed of two members 8^a and 8^b, which are provided with overlapping apertured parts adapted to be connected by a bolt 8^d. The advantage of

this construction is that it can be applied to a pipe-section of any length without the necessity of separating the pipe in order to pass the clamping-plate over the free end of the section directly connected with the head-gate. In other respects this form of construction operates exactly the same as the integral form of clamping-plate shown in Figs. 2 and 5.

The upper part of the frame is provided with a lug A, upon which is pivotally mounted a dog B, adapted to engage the toothed rack of the bar 22, whereby the bar will be supported in any position to which it is raised through the instrumentality of the spindle and gear. It will thus be supported in position to permit the insertion of the locking-pin 25.

Having thus described my invention, what I claim is—

1. In an irrigating head-gate, the combination with a suitable frame whose lower portion is provided with a plate having an opening, and a flange surrounding said opening, a clamping-plate opposed to the first-named plate and having an opening sufficiently large to receive the conduit with which the device is to be connected, the clamping-plate being provided with bolts which pass through suitable openings formed in the frame-plate, for fastening the device to the bell end of the conduit, a vertically-movable gate mounted in the frame and arranged to control the opening in the frame-plate, and suitable means journaled in the frame and acting on the gate for controlling the vertical position of the latter, substantially as described.

2. The combination with a conduit having a bell extremity, of a head-gate comprising a plate having an opening surrounded by a flange which the bell extremity of the conduit surrounds, a space being left between the bell extremity of the conduit and the flange of the plate, the bell extremity of the conduit being wider than the flange of the plate, leaving a filling-space within the bell extremity of the conduit and around the flange of the plate, and a vertically-movable gate suitably mounted to control the opening in the plate, substantially as described.

3. In a head-gate, the combination with a suitable frame whose lower portion consists of an apertured plate provided with ways on opposite sides of the opening therein, a gate proper engaging said ways and provided with an upwardly-projecting stem whose upper end consists of a rack-bar, the upper part of the frame being fashioned to receive the rack-bar, a spindle journaled in the upper part of the frame and provided with a gear engaging the rack-bar, the upper part of the frame being apertured on opposite sides of the teeth of the rack-bar, a pin passed through the said apertures in the frame and between the teeth of the rack-bar, the said pin having an opening

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at one extremity, and a lock applied to the pin, substantially as described.

4. In a head-gate, the combination of a frame provided with an apertured bottom plate having ways on opposite sides of the opening, upwardly-projecting bars connected with said plate and suitably separated, a top frame part consisting of two members secured to the upper extremities of the bars, a gate proper mounted to move vertically in the ways of the said plate, the said gate being provided with an upwardly-projecting stem whose upper extremities are provided with a rack-bar passing through the upper frame part which is provided with an opening for the purpose, a spindle journaled in the upper frame part and provided with a gear engaging the said rack-bar, the upper frame members being provided with openings on opposite sides of the teeth of the rack-bar, a pin passing through said openings and engaging the rack-bar teeth to lock the gate in the adjusted position, one extremity of the pin being provided with an opening, and a lock whose hasp is adapted to pass through the opening in the

pin whereby the latter is locked securely in place.

5. In an irrigating head-gate, the combination with a suitable frame whose lower portion is provided with a plate having an opening surrounded by a flange, of a two-part clamping-plate opposed to the first-named plate and provided with bolts which pass through openings formed in the first-named plate for the purpose set forth.

6. In an irrigating head-gate, the combination of a suitable frame whose lower portion is provided with a plate having an opening surrounded by a flange extending at right angles to the body of the plate, and a clamping-plate opposed to the first-named plate and having an opening large enough to receive a conduit whose extremities surround the flange of the first-named plate.

In testimony whereof I affix my signature in presence of two witnesses.

CHARLES W. SEITZ.

Witnesses:

DENA NELSON,

A. J. O'BRIEN.

[Endorsed]: K. T. Co., vs. Snow et al., No. B-65-
Eq. Defd. Exhibit "G." Filed May 17, 1916. Wm.
M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.

Defendants' Exhibit "H"—Letters Patent Issued to W. L. Jackson, for Drain or Sewer Pipe.

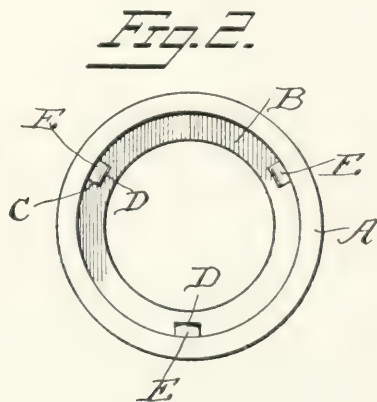
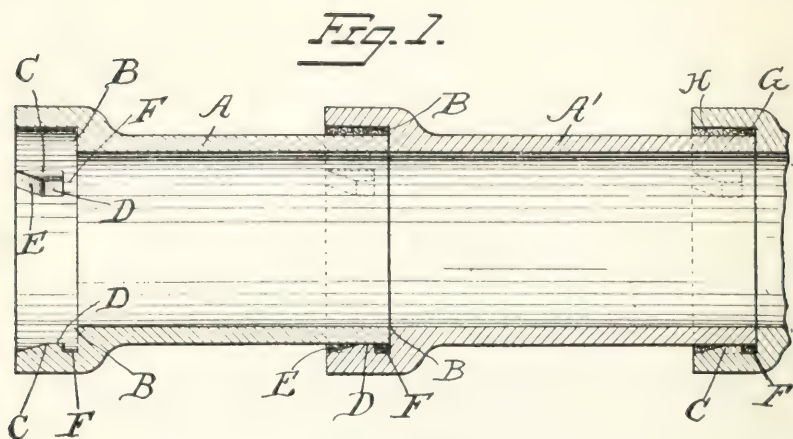
W. L. JACKSON.

DRAIN OR SEWER PIPE.

APPLICATION FILED MAR. 9, 1909.

927,353.

Patented July 6, 1909.



Inventor

William Leaf Jackson

584

Albert Hopkins

Attorney,

Witnesses

Witnesses
R. H. Tucker

W. H. Miller.

UNITED STATES PATENT OFFICE.

WILLIAM LEAF JACKSON, OF BROOKLAND, DISTRICT OF COLUMBIA.

DRAIN OR SEWER PIPE.

No. 927,353.

Specification of Letters Patent.

Patented July 6, 1909.

Application filed March 9, 1909. Serial No. 482,284.

To all whom it may concern:

Be it known that I, WILLIAM LEAF JACKSON, citizen of the United States, residing at Brookland, in the District of Columbia, have invented certain new and useful Improvements in Drain or Sewer Pipes, of which the following is a specification.

My invention relates to improvements in drain or sewer pipes, and particularly to an improved joint or coupling for such pipes. These pipes, which may be formed either of iron or terra-cotta, are commonly provided with a socket at one end into which the smaller end of another section is inserted when the pipe is placed in position for use. It is important that the end of one section should be so related to the end of the abutting section that no ridge or projection will be formed across the interior of the pipe to serve as an obstruction to the flow of water and to catch and retain any solid matter that may be carried by the water. Various means have been heretofore proposed for properly supporting the smaller or spigot end of such a pipe-section in position within the enlarged socket at the adjacent end of another section.

The object of my improvement is to so construct a pipe section that the spigot end of another section can be accurately and correctly placed in the socket and held in true alinement with the body of the section until the cement, lead or other fastening material has been introduced into the socket and around the spigot end of the pipe section.

Another object of my improvement is to so construct a pipe section that the bell mouthed portion will be provided with a centering lug provided with means for retaining the packing and cement around the spigot end of the pipe to firmly hold the same in the socket.

Referring to the accompanying drawings and to the letters of reference thereon, which form a part of this specification: Figure 1 is a longitudinal sectional view through a series of pipe sections constructed in a manner showing my improved centering device. Fig. 2 is an end elevation of one of the pipe sections embodying my improvements.

A represents the pipe section provided at one end with the bell mouthed socket B. Within the socket B and at the inner end thereof I arrange a series of inwardly extending lugs C. These lugs, which may be formed integral with the pipe section, are

preferably made in the form shown—that is, each lug has a surface D extending parallel to the length of the pipe section and an inclined surface E extending from the aforesaid surface D to the edge of the socket B. The lugs C also are provided with a pocket F for retaining a packing of hemp G and for allowing the cement H to flow in around the spigot end of the pipe section to firmly hold the same in the socket. In the drawings I have shown the socket B as provided with three of these inwardly extending lugs C, arranged equidistant from each other; but any suitable number may be employed.

From the above description and the drawings it will be seen that when the spigot end of section A is inserted into the socket B of the section A' the inclined surface E of the lugs C will cause its inner end to be properly guided into position of alinement with the passage in the tube section A'. It will also be seen that I so arrange the lugs C that the spigot end is held from either lateral or vertical movement, but is adapted to be revolved or turned about the longitudinal axis in order that the two ends of the sections A, A' may be arranged in the best possible relation to each other. It frequently happens that these pipes are not perfectly true circles in cross-section, and by my construction the pipe setter is enabled to rotate the spigot end until the "flow line" of the sections is properly related to each other.

One of the great advantages incident to my improved construction is that behind the lugs C is formed a pocket F for the packing to slip into behind the surface D and to allow the cement to flow in around the spigot end of the pipe sections to firmly retain the same in position and to make a very rigid joint.

What I claim as my invention and desire to secure by Letters Patent is:—

1. A pipe section having at one end a socket of greater diameter than the body part and formed with tapering lugs integral therewith provided with means to retain a packing and cement around the spigot end of a pipe section.

2. A pipe section having at one end a socket of greater diameter than the body part and formed with tapering lugs integral with the socket wall, provided with a pocket to retain a packing and cement around the spigot end of a pipe section, and having in-

2

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clined surfaces extending to the edge of the
socket to enable a pipe section to be inserted
into an adjacent socket and be guided by the
inclined surfaces of the lugs into proper
6 alinement and held against either vertical or
lateral displacement, substantially as set
forth.

In testimony whereof I affix my signa-
ture, in presence of two witnesses.

WILLIAM LEAF JACKSON.

Witnesses:

ALBERT POPKINS,
M. H. YATES.

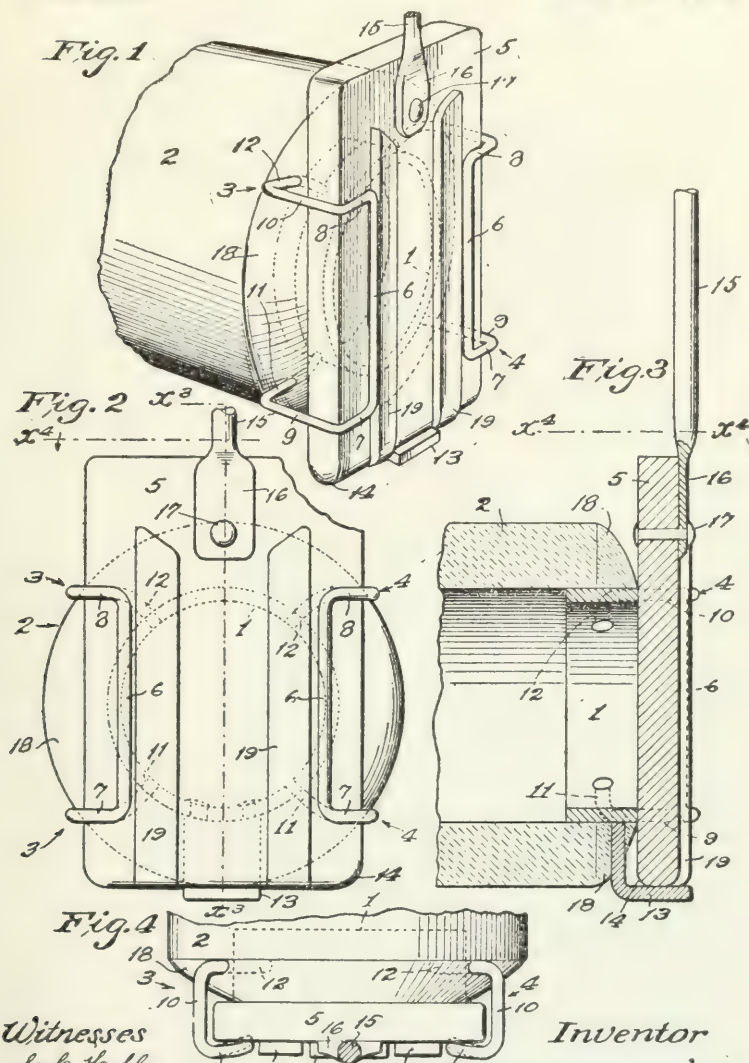
[Endorsed]: K. T. Co., vs. Snow et al., No. B-65-
Eq. Defd. Exhibit "H." Filed May 17, 1916. Wm.
M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.

Defendants' Exhibit "I"—Letters Patent Issued to
H. E. Worley, for Irrigating Pipe Gate.

H. E. WORLEY.
IRRIGATING PIPE GATE.
APPLICATION FILED APR. 21, 1909.

969,320.

Patented Sept. 6, 1910.



Witnesses
L. C. Holly
W. B. Bulah Townsend

Inventor
Henry Elmer Worley
By James R. Townsend
his atty.

UNITED STATES PATENT OFFICE.

HENRY ELMER WORLEY, OF REDLANDS, CALIFORNIA.

IRRIGATING-PIPE GATE.

969,320.

Specification of Letters Patent.

Patented Sept. 6, 1910.

Application filed April 21, 1909. Serial No. 491,377.

To all whom it may concern:

Be it known that I, HENRY ELMER WORLEY, a citizen of the United States, residing at Redlands, in the county of San Bernardino and State of California, have invented a new and useful Irrigating-Pipe Gate, of which the following is a specification.

In southern California, water for irrigation is frequently taken from ditches by means of concrete pipes that are set in the earth and extend through the wall of the ditch. Means for closing and regulating the orifice through these pipes must be provided so that the water can be shut off from flowing through the pipes when the water in the ditch is high enough to flow into the pipes.

An object of this invention is to provide convenient, cheap and satisfactory means for applying adjustable gates to the ends of such pipes.

The invention also is adapted for application in case of metal or other pipes, as will hereinafter more fully appear.

The invention may be embodied in different forms, and I do not limit the same to a specific form of construction.

The accompanying drawings illustrate the invention in the form I at present deem most desirable for concrete pipes.

Figure 1 is a perspective view of a gate as applied with a collar fitting inside a concrete pipe, the end of which is shown projecting from the inside wall of a ditch. Fig. 2 is a front elevation of the same. Fig. 3 is a section on line x^3 , Fig. 2. Fig. 4 is a plan from line x^4 , Figs. 2 and 3.

1 is a metal collar adapted to fit inside a concrete pipe 2. Said collar is provided with two spring clamping members 3, 4, which may be of spring wire of any suitable kind as iron, steel, copper, etc., extending from the collar and bent to receive between the clamping members and the collar a gate 5.

Each of the clamping members may consist of a single piece of wire having a middle clamping limb 6, and being thence bent at right angles at both ends of said limb 6 to form lower and upper arms 7, 8, and again bent to form lower and upper extensions 9, 10 that extend at right angles to the middle limbs 6 and lower and upper arms 7 and 8, and practically parallel with the axis of the collar; and again bent to form posts 11, 12 that are riveted or other-

wise secured in the collar 1. Said collar 1 may be of cast or wrought metal, and the inner ends of the posts 11 and 12 may be secured to the collar by riveting the ends or by casting the collar on the ends of the wires which form the posts. At the bottom of the collar a stop 13 is provided formed of a wire or strip of metal bent at right angles and secured at one end to the collar, and projecting downwardly therefrom, and there bent and extending with its free end beyond a vertical line drawn from the end of the collar, so that when a gate 5 of appropriate thickness is inserted downwardly between the clamping limbs 6 and the end of the collar it will wedge tightly between said limbs 6 and the end of the collar 1, thus to be held flat against the end of the collar so as to prevent water from flowing into the collar from the ditch or other source of supply. The upper ends of the middle limbs 6 are bent slightly aslant from the plane of the free end of the collar, and the main bodies of said limbs are parallel with such plane.

The gate may be rounded at its lower end as indicated at 14, so that it will not catch on any of the parts until the lower end of the gate has passed the lower side of the collar, when it will come to rest upon the stop 13. The gate 5 may be provided with a handle 15 that may be a rod flattened at one end as shown at 16, and secured by a rivet or other fastening means 17, to the gate. Said fastening means may be in the form of a pivot for allowing the handle to be turned down out of the way when not in use. The invention is not limited by the form of handle or its fastening.

To apply the gate to the cement pipe 2 the collar will be inserted into the end of the pipe, and luting 18 of cement is then applied around the collar and against the end of the pipe 2 so as to cement the collar firmly in the pipe. This luting may also embed the posts 11 and 12, thus permanently securing the collar in the end of the concrete pipe.

In practical use the head-gate 5 may be raised and lowered as desired, by the handle 15, to allow the requisite amount of water to flow through the concrete pipe.

It is understood that the collar and its attachments are not limited to use with concrete pipes, but that the collar may be fastened inside or outside other forms of pipe,

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as for instance, cast or sheet iron pipe, wooden pipe, vitrified pipe, tiling, and so on.

It is also understood that the collar may be regarded as a section of pipe, and that in case of cast iron pipe or wrought iron pipe, or the like, which is of itself strong enough to hold the clamping members, said members may be connected with the pipe directly, in the same manner as they are connected with the collar in the form shown; the principle being that the clamping members are fastened to and extend from the sides of the pipe, thence bent in lines practically parallel with the axis of the pipe, and thence bent inwardly toward the axis of the pipe, so as to receive the gate between the inwardly-bent portions and the end of the pipe, and also preferably bent as shown in the drawings, toward the plane of the end of the pipe, so that when the gate is inserted it only engages the middle clamping limbs 6. A cleat or cleats may be applied to the gate to form guides to engage the middle clamping members 6. In the drawings 19 designates such cleats.

The gate may be made of wood, iron, or any other suitable material, and the handle for the gate may be of any desired construction.

The arms 7 and 8 are preferably bent oblique to the plane of the end of the column or pipe so that when the gate is inserted between said end and the upright middle limbs 6, practically the only engagement of the clamping member with the gate is along the inside faces of such limbs, and by reason of the rounded or tapered end 14 of the gate 5 the limbs may be forced out as the gate is shoved down into place, and the arms 7 and 8 are resilient so as to constantly press the gate against the end of the collar,

thus to hold the gate in place and tightly close that portion of the orifice covered by the gate.

In Fig. 4 dotted lines indicate the free position of the arms 8, it being understood that the arms 7 are immediately thereunder, and that when the gate is withdrawn the arms 7 and 8 will spring into the dotted position.

I claim:—

1. The combination with a pipe, of a gate to close the pipe, and two continuous wire clamping members each composed of a middle limb extending parallel with the plane of the gate to form resilient arms and thence again bent to form lower and upper extensions extending lengthwise of the axis of the pipe, said limbs operating to hold the gate against the pipe.

2. In a pipe head gate, a collar, wires fastened to the sides of the collar and bent to form limbs beyond the end of the collar, a stop fastened to the collar and extending below the end thereof, and a gate to fit between the limbs and the end of the collar, said stop being adapted to stop the gate.

3. The combination with a pipe, of a collar having wire members fastened thereto and extending beyond the end of the collar and there inwardly bent to form clamping limbs, luting to cement the collar to the pipe, the same embedding a portion of said wire members to retain the collar in place.

In testimony whereof, I have hereunto set my hand at Los Angeles, California, this 14th day of April, 1909.

HENRY ELMER WORLEY.

In presence of—

JAMES R. TOWNSEND,

L. BELLE RICE.

[Endorsed]: K. T. Co., vs. Snow et al., No. B-65—
Eq. Defd. Exhibit "I." Filed May 17, 1916. Wm.
M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.

**Defendants' Exhibit "J"—Letters Patent Issued to
J. H. Buttorff, for Headgate.**

J. H. BUTTORFF.

HEAD GATE.

APPLICATION FILED JUNE 4, 1910

976,720.

Patented Nov. 22, 1910.

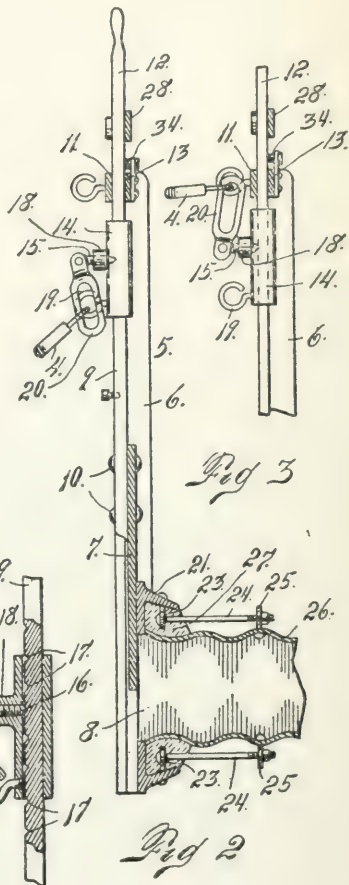
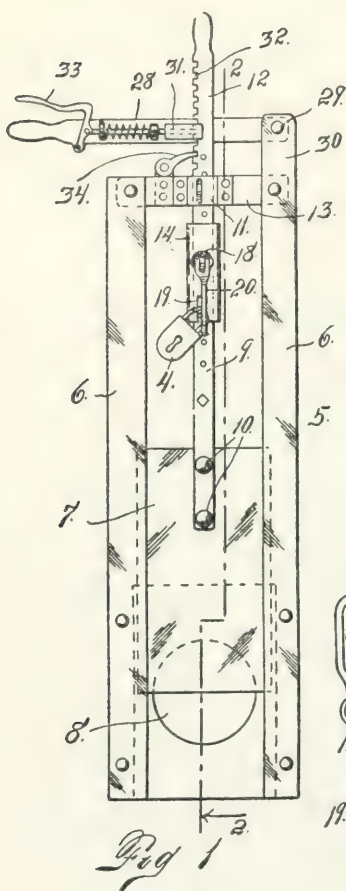


Fig. 4

Witnesses
Otto E. Haddock
C. H. Rossmor.

Inventor
John H. Buttorff.
By J. O'Brien
Attorney

UNITED STATES PATENT OFFICE.

JOHN H. BUTTORFF, OF FORT COLLINS, COLORADO.

HEAD-GATE.

976,720.

Specification of Letters Patent.

Patented Nov. 22, 1910.

Application filed June 4, 1910. Serial No. 565,005.

To all whom it may concern:

Be it known that I, JOHN H. BUTTORFF, a citizen of the United States, residing at the city of Fort Collins, county of Larimer, and State of Colorado, have invented certain new and useful Improvements in Head-Gates; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to the letters and figures of reference marked thereon, which form a part of this specification.

My invention relates, generally speaking, to improvements in head gates, adapted to control the flow of water from an irrigating ditch or canal to a lateral or branch ditch which supplies the consumer with a predetermined quantity of water. This gate belongs to that class of gates which are adapted to be locked in such a manner that they cannot be opened wider than a predetermined limit, whereby the consumer is prevented from using more water than he is entitled to. Where these gates are employed, there is a ditch rider or superintendent who adjusts the gate and secures it in such a manner that the consumer cannot use more water than a predetermined quantity for which he has agreed to pay.

In my improved construction the stem of the gate is equipped with a vertically adjustable block into which is threaded on one side a set bolt to the outer extremity of which is pivotally connected a slotted arm or link which after the set bolt is tightened to secure the block in place on the stem, is adjusted so that its slot shall register with the eye bolt also carried by the block. The hasp of a padlock is then passed through the opening in the link and also the eye of the bolt, after which the hasp is inserted in the lock and secured against removal except by a person holding the key to the lock. When this block is thus secured, it forms a stop to prevent the upward movement of the stem farther than the stop will allow. In other words, when the upper extremity of the stop engages a cross bar at the top of the head gate frame, the gate is open to allow the flow of the quantity of water to which the consumer is entitled, to pass through, but no more. Provision is also made whereby the link attached to the adjustable stop may be connected with the eye

of a bolt riveted to the top of the frame, the link and bolt being secured together by passing the hasp of a padlock through the opening of the link and the eye of the bolt. In this event the gate is prevented from being opened farther than the stop will allow, while at the same time, it cannot be closed except by a person holding the key to the lock.

It sometimes happens that it is important to prevent the consumer from closing the gate, since if this is done the accumulation of water in the ditch or canal may result in an overflow. Under these circumstances the gate is locked to prevent both opening and closing.

In my improved construction the stem of the head gate is toothed or notched on one side and a lever is fulcrumed on the frame and equipped with a spring-actuated dog adapted to engage the notches of the stem. By means of this lever the head gate is raised. By the employment of a lever for this purpose, the vertical manipulation of the head gate may be quickly and easily accomplished, thus giving an advantage in this respect over a nut for raising and lowering the gate.

In my improved construction I prefer to employ a corrugated iron pipe or conduit which is connected with the head gate frame by suitable means. As shown in the drawing, the head gate frame on the canal side is provided with a collar which is inclined rearwardly as it extends rearwardly, the said collar being equipped with interiorly projecting eyes or apertured lugs. The heads of the bolts are connected with these lugs, the bolts extending rearwardly and passing through eyes or apertured lugs with which the conduit is provided. The heads of the bolts in addition to being anchored by the apertured lugs, are further secured in place by a body of cement which is placed between the collar and the inner extremity of the corrugated pipe or conduit.

Having briefly outlined my improved construction, I will proceed to describe the same in detail, reference being made to the accompanying drawing, in which is illustrated an embodiment thereof.

In this drawing: Figure 1 is a front view of a head gate equipped with my improvements. Fig. 2 is a section taken through the gate on the line 2-2, Fig. 1. Fig. 3 is a side elevation of the upper part of the head

gate frame, the stem and the locking devices, illustrating the manner of locking the gate to prevent closing. Fig. 4 is a sectional detail view of the locking device mounted on the stem of the head gate, the parts being shown on a larger scale.

The same reference characters indicate the same parts in all the views.

Let the numeral 5 designate the head gate frame consisting of upright bars 6 having grooved ways adapted to receive the opposite edges of a head gate 7, which is adapted to close an opening 8 either partially or wholly, through which the water flows from the canal to the lateral, first passing through the conduit or pipe section connected with the frame as hereinafter described in detail.

The stem 9 is secured to the gate in any suitable manner as by rivets or other suitable fastening devices 10. This stem passes through an opening 11 formed in the top bar 12 of the head gate frame and protrudes above the same as shown at 12.

Mounted on the stem below the cross bar 13 of the head gate frame is a block 14 which is adjustable by means of a set bolt 15, whose inner extremity is pointed as shown at 16 to enter recesses 17 with which one side of the stem is provided. The block 14 is reinforced as shown at 18 and interiorly threaded to receive the set bolt 15.

Made fast to the block or stop 18 is an eye 19, which is preferably located below the set bolt. To the outer extremity of the set bolt is pivotally connected a link 20 which when turned downwardly, may be caused to register with the eye 19. Then by locking the link to the eye 19 by means of a padlock 4, the stem cannot be moved upwardly farther than is desired in order to allow the requisite quantity of water to pass through the gate. Now if it is desired to lock the gate against closing as well as against opening, the block 14 is first properly adjusted to permit the required opening movement. The gate is then raised until this block or the stem strikes the cross bar 13, after which the link is thrown to the position shown in Fig. 3, whereby the gate is locked against closing as well as against opening.

The rear surface of the head gate frame is provided with a collar 21 forming an inwardly flared rearwardly extending member. The inner surface of this collar is equipped with apertured lugs 23, which form an anchorage for the heads of the bolts 24, the threaded extremities of the bolts passing through apertured lugs or eyes 25, secured to a corrugated conduit member 26. The space between the collar 21 and the conduit 26, is filled with cement or concrete 27, whereby the heads of the bolts are completely buried.

The lifting movement of the gate is accomplished through the instrumentality of a lever 28 fulcrumed as shown at 29 on an

extension 30, with which one of the side members 5 of the head gate frame is provided. Between the fulcrum and the extremity of the lever, the latter crosses the portion 12 of the head gate stem above the cross bar 13 and a spring-actuated dog 31 with which the lever is provided, is adapted to enter notches 32 formed in one edge of the stem. This dog is controlled by a hand piece 33 connected with the lever in the usual way. When the dog of the lever is interlocked with the toothed edge of the stem, as shown in Fig. 1, in order to raise the gate it is only necessary to lift on the free extremity of the lever, and a gravity pawl 34 will engage a notch 32 and support the gate to the height raised, by this movement of the lever. If a further opening movement of the gate is required, the dog 31 is withdrawn from its notch, and the handle extremity of the lever lowered and the dog 31 allowed to engage a lower notch, after which the lifting operation is repeated. This may be done as often as necessary in order to give the gate the required opening movement. This movement, however, is limited by the stop block 14, which it is assumed is properly adjusted and locked as heretofore explained.

Having thus described my invention, what I claim is:

1. The combination with a head gate having a stem, of a stop block slidably mounted on the stem, a set bolt threaded in the block for securing the block in place on the stem, and means for locking the set bolt against movement, substantially as described.

2. The combination with a head gate having a stem, a frame in which the head gate is movable, the frame having a cross bar provided with an opening through which the stem of the gate passes, a stop block mounted on the stem below the cross bar of the frame, a set bolt threaded in the block, and means for locking the set bolt against turning, substantially as described.

3. The combination with a frame, a head gate movable in the frame, and having a stem passing through an opening formed in a cross bar with which the frame is provided, a stop block slidably mounted on the stem below the cross bar, a set bolt threaded in the stop block and having its inner extremity pointed to enter recesses with which the stem is provided, a link pivotally connected with the set bolt, and means coöperating with the link for locking the set bolt against turning movement, substantially as described.

4. The combination with a head gate having a stem, of a stop block slidably mounted on the stem, a set bolt threaded in the stop block, a link connected with the set bolt, and means coöperating with the link for locking the set bolt against turning and for

simultaneously locking the gate against downward movement.

5 5. The combination with a head gate frame, and a head gate having a stem, of a
stop block adjustably mounted on the stem,
a set bolt carried by the stop block, a slotted
link connected with the outer extremity of
the set bolt, an eye mounted on a top cross
bar with which the head gate frame is
10 equipped, and arranged to register with the
slot of the link, and a padlock for securing
the link to said eye, substantially as described.

13 6. The combination with a head gate
frame, of a gate slidably mounted in the
frame and provided with a toothed stem,
and a lever fulcrumed on the frame at one
side thereof and crossing the stem, the said
lever having a spring-actuated dog adapted
20 to engage the toothed edge of the stem for
manipulating the gate, substantially as described.

25 7. The combination with a head gate
frame, of a gate slidable in the frame and
having a stem toothed on one edge, a lever
fulcrumed on the frame at one side thereof

and crossing the stem, the said lever carrying a spring actuated dog adapted to enter the notches of the stem, and a gravity pawl mounted on the frame and also adapted to engage the notches of the stem, substantially as described. 30

8. The combination with a head gate frame having an opening and a gate for controlling the said opening, of a corrugated pipe section extending rearwardly from the head gate frame and registering with the opening therein, a collar secured to the head gate frame and having inwardly projecting apertured lugs, the pipe section also being equipped with apertured lugs, bolts connecting the two sets of apertured lugs, and means for anchoring the bolts in the space between the collar and the forward extremity of the corrugated pipe section, 40 substantially as described.

In testimony whereof I affix my signature in presence of two witnesses.

JOHN H. BUTTORFF.

Witnesses:

A. J. O'BRIEN,
HORTENSE UHLERICH.

[Endorsed]: K. T. Co. vs. Snow et al., No. B-65-
Eq. Defd. Exhibit "J." Filed May 17, 1916. Wm.
M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.
Cassell Severance, Patent Attorney, Suite 908 Security Building, Los Angeles, Cal.

**Defendant's Exhibit "K"—British Letters Patent
No. 7442 Issued to Ovid Topham, for Sluice
Cocks for Waterworks.**



A. D. 1837 No. 7442.

**Sluice Cocks for Waterworks, applicable to Steam,
Gas, and other Pipes.**

TOPHAM'S SPECIFICATION.

TO ALL TO WHOM THESE PRESENTS SHALL COME, I, **OVID TOPHAM**, of Whitecross Street, in the Parish of St. Luke's, in the County of Middlesex, Engineer and Millwright, send greeting.

WHEREAS Her present most Excellent Majesty Queen Victoria, by Her
5 Royal Letters Patent under the Great Seal of Great Britain, bearing date at
Westminster, the Fifth day of October, in the first year of Her reign, and
in the year of our Lord One thousand eight hundred and thirty-seven, did, for
Herself, Her heirs and successors, give and grant unto me, the said Ovid
Topham, Her especial license, full power, sole privilege and authority, that I,
10 the said Ovid Topham, My executors, administrators, and assigns, or such
others as I, the said Ovid Topham, my executors, admors, or assigns, should
at any time agree with, and no others, from time to time and at all times during
the term of years therein mentioned, should and lawfully might make, use,
exercise, and vend, within that part of the United Kingdom of Great Britain
15 called England, the Dominion of Wales, and Town of Berwick-upon-
Tweed, and also in all Her Majesty's Colonies and Plantations abroad, my
Invention of "CERTAIN IMPROVEMENTS IN THE CONSTRUCTION OF SLUICE COCKS FOR
WATERWORKS, AND WHICH IMPROVED CONSTRUCTION OF COCKS IS ALSO APPLICABLE TO
STEAM, GAS, AND OTHER PURPOSES;" in which said Letters Patent is contained a
20 proviso obliging me, the said Ovid Topham, by an instrument in writing under
my hand and seal, particularly to describe and ascertain the nature of my said

Topham's Improvements in Sluice Cocks for Waterworks, &c.

Invention, and in what manner the same is to be performed, and to cause the same to be enrolled in Her Majesty's High Court of Chancery within six calendar months next and immediately after the date of the said in part recited Letters Patent, as in and by the same, reference being thereunto had, will more fully and at large appear.

5

NOW KNOW YE, that in compliance with the said proviso, I, the said Ovid Topham, do hereby declare, that the nature of my said Invention, and the manner in which the same is to be performed, are particularly described and ascertained in and by the following description thereof, reference being had to the Drawings hereunto annexed, and to the letters and figures marked thereon (that is to say):—

My invention of certain improvements in the Construction of Sluice Cocks for Waterworks, and which Improved Construction of Cocks is also applicable to Steam, Gas, and other Purposes, applies more particularly to that description of sluice cocks or valves which are usually placed under ground in the street mains or service pipes of water and gas works, in which situation the metal composing the same is liable to injury by corrosion or the chemical action of different earthy matters in contact therewith, but which effect is more particularly injurious as regards the wrought-iron screw bolts and nuts, and the metallic packing used in securing the various junctions of the parts composing the casing or body of the said sluice cocks or valves, in consequence of which frequent leakage takes place. The object of my Invention is to obviate such evil by making or manufacturing such sluice cocks and valves without the usual side or vertical joints or junctions, by which means their necessary screw bolts, nuts, and metallic packing are dispensed with, and consists in forming or casting the main body or casing of such sluice cocks or valves in one continuous piece of metal, having only one opening or aperture at the upper part for the convenience of fitting up and applying the slide of the valve, which aperture is afterwards closed with the necessary cap-piece or cover fitted in the usual manner, through which the shaft or spindle connected with the screw rack and pinion, or other mechanical contrivance used for raising or lowering the slide of the cock or valve, is passed; and as such cap-piece is not usually covered with earth, its joints or junctions and packings are not so liable to injury as those at the side of the ordinary sluice cocks. And in order further to illustrate my improvements, and the manner of carrying the same into effect, I will now refer to the accompanying Drawings, which are several representations of my improved construction of sluice cocks or valves, shewing several modifications or arrangements of the same, which different modes or contrivances for raising and lowering the slide or stop piece, but

Topham's Improvements in Sluice Cocks for Waterworks, &c.

which contrivances I do not consider as part of my Invention, they being in common use, and I have only shewn them in order that the mode of applying and using the same with my improved sluice cocks or valves may be readily understood.

5 Fig. 1 is a side elevation of one of my improved sluice cocks or valves detached from the street main or service pipe. Fig. 2 is a vertical section of the same. Fig. 3 is a plan or horizontal view, the cap-piece or cover being removed to expose the interior; and Figures 4 and 5 are back and face representations of the slide or stop piece removed from out of the valve to shew
10 its construction, the same letters of reference being marked upon these and all the following Figures. *a, a*, is the main body or casing of the valve cast in one piece, with the two ends or sockets *b, c*, for receiving the ends of the street pipes or mains, together with the upper part or chamber *d*, in which the mechanical contrivance for raising and lowering the slide is placed, which in
15 this instance is a toothed rack and endless screw. *e* is the cap-piece or cover of the chamber *d*, fitted in the usual way with screw bolts and nuts and metallic packing and the stuffing box *f*, through which the spindle or shaft *g* is passed, its lower end turning in a proper bearing, and having the endless worm or screw *h* formed upon it, which takes into the toothed rack *k* formed upon the
20 back of the slide *i*, which is accurately fitted at the parts *m, m* to the face of the aperture *n* of the valve or cock; the slide is kept tight against the face of the aperture when closed by means of inclined planes or wedge pieces at *o, o*, formed on the casing coming in contact with other parts *p, p*, of the slide. This action of this valve will be readily understood by inspecting the Drawings,
25 therefore no further description will be necessary.

Fig. 6 is a longitudinal vertical section of another sluice cock or valve of my improved construction, shewing a slight variation in the mode of applying and fitting the slide thereto, and in the manner of making the same, which in this instance has double faces fitted against the mouths of the apertures, and
30 is worked by means of a male screw formed upon the shaft taking into a female screw upon the slide; and Fig. 7 is a plan view of the same; similar letters of reference being marked upon corresponding parts, as in the former Figures, and the construction of this valve being so simple, it will not be necessary for me further to describe it, the slide being in this instance fitted
35 between two surfaces or faces formed on the mouths of the apertures *n, n*, of the valve or cock. Figures 8 and 9 are front and back views of the slide and screw. Fig. 10 is a side elevation, Fig. 11 is a longitudinal vertical section, and Fig. 12 is a plan view of another of my improved valves or cocks, in which another slight variation in the fitting up and applying the slide is shewn,
[141]

Topham's Improvements in Sluice Cocks for Waterworks, &c.

the face of which in this instance is fitted against the face of the aperture *n* of the end piece or socket *c*, which in this modification is cast separate from the valve case or box, and secured by a screw joint and packing or other fastening to the valve case. This mode may be preferred by some persons for the convenience of accurately forming the face of the aperture, or the convenience of 5 putting brass faces thereon, which can easily be done when it is detached from the valve; whereas, in the former instances, the faces of the apertures have to be accurately formed by means of tools introduced into the valve case through the chamber *d*. Figures 13 are various detached representations of the slide, the better to shew its construction. 10

Fig. 14 is a side elevation, Fig. 15 is a vertical section, and Fig. 16 is a plan view of another modification of my improved construction of slide valve or cock, shewing the slide fitted with double facings in contact with the mouths of the two ends or sockets *b* and *c*, which in this instance are both moveable for the purpose, as above stated; in other respects the construction is the 15 same as that last described. Figs. 17 are side and face representations of the slide and its shaft or spindle detached from the valve to shew the manner of fitting up the same.

Having now described my improvements in the construction of sluice cocks or valves, and the manner of carrying the same into effect, I would remark 20 that it will be evident that the same is applicable to steam pipes, brewers and distillers liquor pipes, and various other situations where it is desirable to obviate the evil arising from leakage of the side joints of sluice cocks or valves of the ordinary construction; and in construction to state, that I do not claim any of the mechanical contrivances herein described and shewn for raising and 25 lowering the slides of the said cocks or valves, or the mode of fitting or applying the same with the necessary shafts or spindles and stuffing boxes, as they are not new, and form no part of my invention, my improvements consisting in, and what I claim as my improvements being, the making, forming, or casting the main body, box, or casing of the slide valve or cock in one and the same piece 30 of metal, and the modes of fitting and applying the slide or stop piece thereto, and the manner of forming the facings of the cocks or valves, as herein set forth and described.

In witness whereof, I, the said Ovid Topham, have hereunto set my hand and seal, this Fifth day of April, One thousand eight hundred 35 and thirty-eight.

OVID (L.S.) TOPHAM. [141a]

Topham's Improvements in Sluice Cocks for Waterworks, &c.

AND BE IT REMEMBERED, that on the Fifth day of April, in the first year of the reign of Her Majesty Queen Victoria, the said Ovid Topham came before our said Lady the Queen in Her Chancery, and acknowledged the Instrument aforesaid, and all and every thing therein contained and 5 specified, in form above written. And also the Instrument aforesaid was stamped according to the tenor of the Statute made in the fifty-fifth year of the reign of His late Majesty King George the Third.

Inrolled the Fifth day of April, One thousand eight hundred and thirty-eight.

LONDON:

Printed by GEORGE EDWARD EYRE and WILLIAM SPOTTISWOODE,

Printers to the Queen's most Excellent Majesty. 1856.

[In right-hand margin:] FARRER.

A. D. 1907 OCT 3 M 1162
 THOMSON'S PATENT



Fig. 8.



Fig. 9.



Fig. 10.



Fig. 11.



Fig. 13.



Fig. 14.

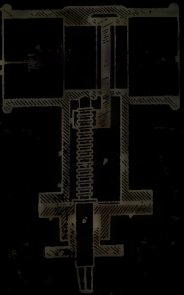
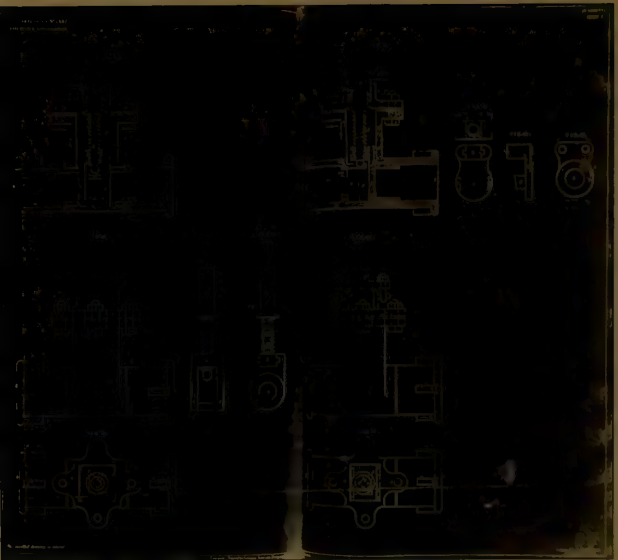


Fig. 15.



Fig. 16.

A. D. 1907
 OCT 3 M 1162



[Endorsed]: K. T. Co. vs. Snow et al. No. B-65—Eq. Defd. Exhibit “K.” Filed May 17, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.

Defendants' Exhibit "M"—Photograph.



[Endorsed]: K. T. Co. vs. Snow et al., No. B-65-
Eq. Defd. Exhibit "M." Filed May 17, 1916. Wm.
M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk.

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—No. B-65.

KELLAR-THOMASON COMPANY,
Plaintiff,

vs.

FRANK P. SNOW and FRANK S. LIVINGSTON,
Doing Business as Partners Under the Name
of SNOW MANUFACTURING COMPANY,
Defendants.

Petition for Appeal.

The defendants in the above-entitled suit conceiving themselves aggrieved by the Interlocutory Decree made and entered in the above-entitled suit on May 25, 1916, granting an injunction as in said Decree set forth against defendants, and each of them, come now by Frederick S. Lyon, Esq., their solicitor and counsel, and petition said court for an order allowing defendants to prosecute an appeal from said Decree to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit under and according to the laws of the United States in that behalf made and provided, and also for an order fixing the sum of security which defendants shall give and furnish upon said appeal.

FREDERICK S. LYON,
Solicitor for Defendants. [147]

[Endorsed]: No. B-65—Eq. United States District Court, Southern District of California, Southern Division. Kellar-Thomason Company, Plaintiff, vs.

Frank P. Snow and Frank S. Livingston, Doing Business as Partners Under the Name of Snow Manufacturing Company, Defendants. In Equity. Petition for Appeal. Filed June 22, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants' Trust Building, Los Angeles, Cal., Solicitor for Defendants. [148]

United States District Court, Southern District of California, Southern Division.

IN EQUITY—No. B-65.

KELLAR-THOMASON COMPANY,

Plaintiff,

vs.

FRANK P. SNOW, and FRANK S. LIVINGSTON,
Doing Business as Partners Under the Name
of SNOW MANUFACTURING COMPANY,
Defendants.

Order Allowing Appeal and Fixing Amount of Bond.

In the above-entitled suit, the defendants having filed their petition for an order allowing an appeal from the Decree of this court made and entered in this suit on May 25th, 1916, granting an injunction against defendants, together with Assignments of Error;

Now, on motion of Frederick S. Lyon, Esq., solicitor for defendants, it is ordered that said appeal be and hereby is allowed to defendants to the United States Circuit Court of Appeals for the Ninth Circuit from said decree granting and allowing an injunction

against defendants, and that the amount of defendants' bond on said appeal be and the same is hereby fixed in the sum of two hundred fifty dollars, the same to act as a supersedeas of the judgment for costs and disbursements heretofore entered against defendants.

It is further ordered that upon the filing of such security a certified transcript of the records and proceedings herein, in accordance with the statutes and the Equity Rules, [149] be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Dated June 22d, 1916.

OSCAR A. TRIPPET,

District Judge.

[Endorsed]: No. B-65—Eq. United States District Court, Southern District of California, Southern Division. Kellar-Thomason Company, Plaintiff, vs. Frank P. Snow and Frank S. Livingston, Doing Business as Partners Under the Name of Snow Manufacturing Company, Defendants. In Equity. Order Allowing Appeal and Fixing Amount of Bond. Filed June 22, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants' Trust Building, Los Angeles, Cal., Solicitor for Defendants. 3 Eq., Jl., 385. [150]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—No. B-65.

KELLAR-THOMASON COMPANY,

Plaintiff,

vs.

FRANK P. SNOW, and FRANK S. LIVINGSTON,
Doing Business as Partners Under the Name
of SNOW MANUFACTURING COMPANY,
Defendants.

Assignments of Error.

Come now defendants above named and specify and assign the following as errors upon which they will rely upon their appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Decree of May 25th, 1916, granting an injunction against defendants and each of them as in said decree set forth:

1. Error in adjudging and decreeing that George E. Kellar was the original, first or sole inventor of the new or useful, or any new or useful, improvement in irrigating connections, either as described or as claimed in letters patent No. 1,016,159, granted January 30th, 1912.

2. Error in adjudging and decreeing that said letters patent No 1,016,159, dated January 30th, 1912, is good or valid in law, or that the claim thereof is good or valid in law. [151]

3. Error in adjudging and decreeing that defendants, or either of them, have infringed upon said let-

ters patent or upon the claim thereof in any manner whatsoever.

4. Error in ordering, adjudging and decreeing that a perpetual injunction, or any injunction whatever, issue against defendants or either of them as in said decree set forth, or otherwise at all.

5. Error in not adjudging and decreeing that said alleged letters patent No. 1,016,159 are null and void and of no effect whatsoever.

6. Error in not adjudging that the said alleged invention alleged to be set forth or claimed in and by said alleged letters patent No. 1,016,159 was old and well known prior to the alleged invention thereof by said Kellar.

7. Error in not adjudging and decreeing that the alleged invention to be described or claimed in said alleged letters patent was anticipated and that said Kellar was not the original, first or sole inventor thereof.

8. Error in not adjudging that the said pretended invention alleged to be set forth, described or claimed in or by said pretended letters patent was well known and in common use prior to the alleged invention thereof by said Kellar.

9. Error in not adjudging that said pretended letters patent are void on their face for insufficient description of the pretended invention.

10. Error in not adjudging that the said pretended letters patent are void for insufficiency and indefiniteness in description and showing thereof, and do not contain description in such full, clear and exact terms as to enable one skilled in the art to make

and use the same as required by statute. [152]

11. Error in not adjudging and decreeing that said defendants and each of them have not in any manner infringed said letters patent.

In order that the foregoing Assignments of Error may be and appear of record, defendants present the same to the Court and pray that such disposition may be made thereof as is in accordance with the laws of the United States.

WHEREFORE, the said defendants pray that the said decree of this court made and entered on May 25th, 1916, and the injunction thereby granted and ordered, be reversed and the said injunction set aside, and the said Court be directed to enter a decree ordering and adjudging the said letters patent to be void and not to have been infringed by these defendants, and denying the relief asked by plaintiff against these defendants.

All of which is respectfully submitted.

FREDERICK S. LYON,
Solicitor for Defendants.

[Endorsement]: No. B-65. United States District Court, Southern District of California, Southern Division. Kellar-Thomason Company, Plaintiff, vs. Frank P. Snow and Frank S. Livingston, Doing Business as Partners Under the Name of Snow Manufacturing Company, Defendants. In Equity. Assignments of Error. Frederick S. Lyon, 504-7 Merchants' Trust Building, Los Angeles, Cal., Solicitor for Defendants. [153]

*United States District Court, Southern District of
California, Southern Division.*

IN EQUITY—No. B-65.

KELLAR-THOMASON COMPANY,

Plaintiff,

vs.

FRANK P. SNOW, and FRANK S. LIVINGSTON,
Doing Business as Partners Under the Name
of SNOW MANUFACTURING COMPANY,
Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That the NATIONAL SURETY COMPANY, a corporation of New York, N. Y., is held and firmly bound unto Kellar-Thomason Company, plaintiff in the above-entitled suit in the penal sum of two hundred fifty dollars (\$250), to be paid unto the said Kellar-Thomason Company, its successors and assigns for which payment well and truly to be made NATIONAL SURETY COMPANY, a corporation of New York, N. Y., binds itself, its successors and assigns firmly by these presents.

Sealed with the corporate seal and dated this 22d day of June, 1916.

The condition of the above obligation is such that whereas the said Frank P. Snow and Frank S. Livingston, doing business as partners under the name of Snow Manufacturing Company, defendants in the above-entitled suit, are about to take an appeal to the United States Circuit Court of Appeals for the

Ninth Circuit to reverse a decree made, rendered and [154] entered May 25th, 1916, by the District Court of the United States for the Southern District of California, Southern Division, in the above-entitled cause granting an injunction against the said defendants.

NOW, THEREFORE, the condition of the above obligation is such that if said Frank P. Snow and Frank S. Livingston, doing business as partners under the name of Snow Manufacturing Company shall prosecute their appeal to effect and answer all costs which have been or may be adjudged against them if they fail to make good their appeal, then this obligation shall be void; otherwise to remain in full force and effect.

NATIONAL SURETY COMPANY. (Seal.)

By WILLIAM M. CURRAN,

Its Attorney in Fact.

State of California,

County of Los Angeles,—ss.

On this 22d day of June, in the year, one thousand nine hundred and sixteen, before me Catesby C. Thom, a notary public in and for said county and State, residing therein, duly commissioned and sworn, personally appeared William M. Curran, known to me to be the duly authorized attorney in fact of National Surety Company, and the same person whose name is subscribed to the within instrument as the attorney in fact of said company, and the said William M. Curran acknowledged to me that he subscribed the name of National Surety Company

thereto as principal, and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal [155] the day and year in this Certificate first above written.

[Seal] CATESBY C. THOM,
Notary Public in and for Los Angeles County, State
of California.

No. B-65. United States District Court, Southern District of California, Southern Division. Kellar-Thomason Company, Plaintiff, vs. Frank P. Snow and Frank S. Livingston, Doing Business as Partners Under the Name of Snow Manufacturing Company, Defendants. In Equity. Bond on Appeal. Approved June 22, 1916. Trippet, Judge. Filed June 22, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants' Trust Building, Los Angeles, Cal., Solicitor for Defendants. [156]

UNITED STATES OF AMERICA.

District Court of the United States, Southern District of California, Southern Division.

CLERK'S OFFICE.

IN EQUITY—No. B-65.

KELLAR-THOMASON COMPANY,
Plaintiff,

vs.

FRANK P. SNOW et al.,
Defendants.

Praecept Under Equity Rule 75.

To the Clerk of said Court:

Sir: Please prepare as a transcript of record on appeal by defendants, a copy of each of the following, and duly certify the same as transcript of record on appeal, in accordance with the Equity Rules and statutes in such case made and provided:

Bill of Complaint.

Answer.

Stipulation filed May 17, 1916, and Exhibits Thereto.
Interlocutory Decree.

Petition for Order Allowing Appeal.

Assignment of Error.

Order Allowing Appeal.

Bond on Appeal.

Condensed Statement of Evidence Under Rule 75 as
Approved by the Court.

Copies of All Paper Exhibits.

FREDERICK S. LYON,
Solicitor for Defendants.

[Endorsed]: In Equity—No. B-65. U. S. District Court, Southern District of California, Southern Division. Kellar-Thomason Company, Plaintiff, vs. Frank P. Snow et al., Defendants. Praecept. [157] for ———. Due service and receipt of a copy of the within praecipe is hereby admitted this 13th day of Sept., 1916. Charles C. Montgomery, Solicitor for Plaintiff. Filed Sep. 14, 1916. Wm. M. Van Dyke, Clerk. By T. F. Green, Deputy Clerk. [158]

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

No. B-65—IN EQUITY.

KELLAR-THOMASON COMPANY, a Corporation,

Complainant,

vs.

FRANK P. SNOW and FRANK S. LIVINGSTON, Doing Business as Partners Under the Name of SNOW MANUFACTURING COMPANY,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred fifty-eight typewritten pages, numbered from 1 to 158, inclusive, and comprised in one volume, to be a full, true and correct copy of the Bill of Complaint, the Answer, the Stipulation filed May 17, 1916, the Interlocutory Decree, the Condensed Statement of Evidence under Equity Rule 75, all paper exhibits, the Petition for Appeal, the Order Allowing Appeal and Fixing Amount of Bond, the Assignments of Error, the Bond on Appeal, and the Praeceptum under Equity Rule 75, in the above the therein entitled cause, and that the same together constitute the record in said cause as specified in the said Praeceptum filed in my office on behalf

[159] of the appellants by his solicitor of record.

I further certify that the cost of the foregoing record is \$79.50, the amount whereof has been paid me by Frank P. Snow and Frank S. Livingston, doing business as partners under the name of Snow Manufacturing Company, the appellants herein.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 12th day of December, in the year of our Lord, one thousand nine hundred and sixteen and of our Independence the One Hundred and Forty-first.

[Seal] WM. M. VAN DYKE,
Clerk of the District Court of the United States of
America, in and for the Southern District of
California. [160]

[Endorsed]: No. 2892. United States Circuit Court of Appeals, for the Ninth Circuit. Frank P. Snow and Frank S. Livingston, Doing Business as Partners Under the Name of Snow Manufacturing Company, Appellants, vs. Kellar-Thomason Company, a Corporation, Appellee. Transcript of the Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed December 14, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals,
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

IN EQUITY—No. B-65.

KELLAR-THOMASON COMPANY,

Plaintiff-Appellees,

vs.

FRANK P. SNOW and FRANK S. LIVING-
STON, Doing Business as Partners Under
Name of SNOW MANUFACTURING
COMPANY,

Defendants-Appellants.

**Order Extending Time to October 22, 1916, to File
Record and Docket Cause.**

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said appellants to docket said cause and file the record thereof, with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the 22d day of October, 1916.

Dated at Los Angeles, California, July 18, 1916.

TRIPPET,

U. S. District Judge.

[Endorsed]: No. B-65. United States District Court, Southern District of California, Southern Division. Kellar-Thomason Company, Plaintiff, Appellee, vs. Snow Manufacturing Co. et al., Defendants, Appellants. In Equity. Order Extending Time.

No. ——. United States Circuit Court of Appeals, for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Oct. 22, 1916, to File Record Thereof and to Docket Case. Filed Jul. 20, 1916. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

FRANK P. SNOW and FRANK S. LIVINGSTON, Doing Business as Partners Under the Name of SNOW MANUFACTURING COMPANY,

Appellants,

vs.

KELLAR-THOMASON COMPANY,

Appellees.

Order Extending Time to December 31, 1916, to File Record and Docket Cause.

Good cause appearing therefor, it is hereby ordered that the time of appellant within which to file record and docket cause in the above-entitled court be, and the same hereby is extended to and including the 31st day of December, 1916.

TRIPPET,

Judge.

Dated October 18th, 1916.

[Endorsed]: No. ——. United States Circuit Court of Appeals, for the Ninth Circuit. Frank P. Snow, and Frank S. Livingston, Doing Business as Partners Under the Name of Snow Manufacturing Company, Appellants, vs. Kellar-Thomason Com-

pany, Appellees. Order Extending Time to File Record and Docket Cause to Dec. 31, 1916.

No. 2893. United States Circuit Court of Appeals, for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to Dec. 31, 1916, to File Record Thereof and to Docket Case. Refiled Dec. 14, 1916. F. D. Monckton, Clerk.

No. 2893.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Frank P. Snow, et al.,

Appellants,

vs.

Kellar-Thomason Company,

Appellee.

APPELLANTS' OPENING BRIEF.

Filed

FEB 1 - 1917

FREDERICK S. LYON,

Solicitor for Appellants.

F. D. Monckton,

Clerk.

No. 2893.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

Frank P. Snow, et al.,	}
<i>Appellants,</i>	
<i>vs.</i>	
Kellar-Thomason Company,	
<i>Appellee.</i>	}

APPELLANTS' OPENING BRIEF.

This is an appeal from an interlocutory decree by the United States District Court for the Southern District of California, granting an injunction restraining appellants from infringing a certain patent.

This case was tried in open court before the Hon. Wm. C. Van Fleet, sitting by special assignment.

In this brief the parties will be referred to as plaintiff and defendants.

The bill of complaint is in the usual form, alleging the grant and issuance of the patent in suit and its infringement by defendants.

The answer denies the patentable novelty of the alleged invention and denies infringement.

The patent in suit, No. 1,016,159, was granted on January 30, 1912, upon the alleged invention of a new and useful improvement in irrigating connection. The specification of the patent states:

“In irrigating systems pipes, such as vitrified pipes, are frequently used, and on the end of the pipe a gate or valve is placed to control the flow of the water through the pipe. These pipes are of a simple form and constructed in sections so that the end of one section fits into the mouth of the next section. For this reason the end of the pipe is perfectly plain and of cylindrical form and on this account is not well adapted for attaching a gate or valve constructed of metal.

“The object of this invention is to provide improved means for attaching a gate or valve to the end of such a pipe.”

It is thus seen that the object of the invention is not to provide a novel construction of an irrigating connection or gate or valve, but a novel or improved means for attaching a gate or valve to the pipe of the pipe line.

The first question is, “What is this improved means for attaching?” Plaintiff’s expert says, “The cementitious filler comprising the means to hold the gate on.” [Transcript, last line page 95, testimony Mr. Martin.]

It is not pretended by any of the witnesses on behalf of plaintiff that there was any invention in the particular construction of pipe or valve or gate. In fact, the patent in suit admits that “The specific construction of the gate is immaterial for the purpose of this invention, however, except that the invention is applicable to gates having a face plate 6 as described.”

The inventor, George E. Kellar, testifying on behalf of the plaintiff, admits that the gate shown in the patent is the gate which they had in use prior to the invention. He says: "But I conceived the idea of attaching that gate by means of flange and this cementitious filler." [Transcript page 31.] He admits that long prior to this he had been familiar with cement. He says:

"I knew the value of cement as a means of holding the two parts together, and I knew that by putting in—filling this space between the flange and pipe with this cementitious filler—I could hold the gate in place. That will hold to secure this flange to the end of the pipe. Now, that is the essence of the invention as I understand it." [Record page 31.]

"It is my understanding that the patent *merely* covers the means of attaching a valve or gate to the end of a pipe. *The other elements there were no novelty in.* The only novelty we claim in the combination is the cementitious filler, together with the flange, the flange and cementitious filler and that flange may be on either a gate or a valve." [Transcript page 35.]

As we shall see from the evidence, it is conceded by the witnesses on behalf of the complainant that there was no novelty in the flange. See, for example, testimony of Elmer O. Thomason, record page 42, where he says that the flange is similar in function to the flange of the ordinary bell and spigot joint on the pipe; it formed the annular space around the end of the pipe, just the same, and the cementitious filler was

used between the two identically the same way. The length or degree of flange is a matter of judgment. It was a matter of experiment when we started in with this width of flange. We do not need any other securing means beyond cement.

In this connection it should be noted that Mr. Thomason also testifies [Record page 39]: "Many years prior to this invention I knew of clay water pipes filled with cement between the flange and the end of the other pipe."

Mr. Thomason says in regard to the invention of the patent in suit:

"The essential feature in this patent is the flange as a means of attaching the valve or gate to the end of a concrete pipe, or other kind of pipe; it might be vitrified, the flange allowing the annular space between the end of the pipe and the inside of this flange to be filled with a cementitious filler." [Record page 37.]

From the testimony it is thus clearly deduced that plaintiff's theory is that the "invention," if any, resides solely in the alleged discovery and demonstration that an iron valve could be secured to the end of a cement pipe without any anchors or bolts or clamps, or anything of that sort. [Testimony of Mr. Thomason, Record page 38.]

George C. Martin, manager of the plaintiff company, a lawyer, who testifies he has spent about sixteen years in the practice of patent law, says: "Now, the point is that the inventors who manufactured them did not, in fact, conceive that cement would hold as a *filler*

without some additional means until Mr. Kellar's invention." [Record page 9.]

The patent in suit, therefore, is not claimed to disclose the invention residing in any particular or novel construction of irrigating pipe or irrigating valve or irrigating gate. There is nothing in any of the details of construction of these parts which was new or novel, either alone or in combination with one another. This is also shown to be the fact by reference to the patent to Seitz, record pages 129-133.

Mr. Martin testifies that:

"The patent, therefore, simply covers the combination of a cementitious filler with a flange at the end of a pipe and the opening, and a convenient means of closing it. In other words, it has a means for attaching, and this cementitious substance has a means for attaching the valve and a gate where one—where the gate or valve ends the line." [Record page 46.]

It is proper to call attention at this point to the fact that although the drawings of the patent show and the specification describes the flange 15 as a part of the ring 12 and the casting 6 as a plate formed separate from the ring 12 and fastened thereto by bolts, rivets or "suitable fastening means"—in practice these are cast integral. What is termed the plate 6 merely forms the conventional seat for a slide valve. No novelty is claimed for or existed in this. The specification of the patent recognizes this and says:

"This gate 5 may be of any suitable construction comprising a face plate 6 having an opening 7 therethrough, around the edge of which a suitable

seat 8 is formed for the disk 9 of the gate. The specific construction of the gate is immaterial for the purpose of this invention, however, except that the invention *is applicable* to gates having a face plate 6 as described."

From the face of the patent, as well as from the testimony of plaintiff's witnesses, it is clear that any invention resided in the use of the "means" (a cementitious filler) to adhere to the surfaces of the flange of one part and the periphery of the other part and hold them in fixed relation to one another, at the same time making a water-tight joint. This "inventive thought," whether new or old, resided not in the particular form of the two pieces of pipe, pieces of irrigating system, or pipe and valve or gate, but in these "improved means for attaching" these two parts together, i. e., the cement filler.

That it was old and well known, long prior to Mr. Kellar's supposed invention, to join pieces of drain or sewer pipes together by means of a cementitious filler is shown by the patent to Jackson, number 927,353, dated July 6, 1909. [Record pages 134-136.] See lines 64-66 of Jackson's specification where he says the space between the bell or flange of one end of the pipe and the periphery of the other is filled with cement H and that this cement flows in around the spigot end of the pipe section "*to firmly hold the same in the socket.*"

The patent to Hassell, number 318,616, granted May 26th, 1885, refers to joints for pipes for water, gas, etc. [Record pages 112-113.] The flange B extends

over the periphery of the end of the adjoining pipe section and forms a recess in which the cementitious filler F', "of Portland or other cement," is cast and this ring or band or filler F' of Portland or other cement is the only thing which holds the two pipe sections together.

It would be amazingly strange that one skilled in such art should cast such a ring or filler F' of cement in between the surface of such flange and the surface of the periphery of the pipe section and not ascertain that such cement will adhere to the pipes and hold them together! Any user of Mr. Jackson's device must understand this and must ascertain it from the employment of his device. If not, why not? Is it because the Jackson patent does not describe how to compound the cement filler? Is it because the Jackson specification does not teach that such cement filler is to be of practically pure cement, mixed with water to only the consistency of putty? Is it for the reason that the Jackson specification does not state that the cement filler F' is not to be mixed in the proportions of one of cement and one of sand? If any of these be the failure of the Jackson disclosure, Mr. Kellar's disclosure will be found to fail in the same respects, as will be most specifically pointed out.

On pages 107 and 110 of the record appear extracts from the "International Library of Technology." Each of the drawings [page 110] illustrates joints between pipe sections made by a cementitious filler filled in between a flange and the periphery of a pipe section. If these descriptions and these showings of the joint and

filler are not sufficient, wherein do they fail? If "cement mortar mixed 1:1" will not hold the pieces together or will not give a water-tight connection, *what kind of a cementitious filler will?*

The Worley patent, number 969,320, granted September 6, 1910 [Record pages 137-139], absolutely depends upon the filler or luting of cement 18 to hold the metal collar or ring 1 and the concrete pipe 2 together and forms a water-tight joint between them. Mr. Worley certainly knew and recognized the cementing of these pieces together. He says [Record page 138, Worley's specification, column 2, lines 95-101] this "luting of cement is then applied around the collar and against the end of the pipe 2 *so as to cement the collar firmly in the pipe.*" This is identically the alleged action of the "cementitious" filler of the Kellar patent. Does Mr. Worley's patent fail as an anticipation because he does not more fully describe how to compound his luting or filler of cement? Is it because the workman must experiment and ascertain how to mix cement to make it so hold? If this is the reason, we shall see that the Kellar description is even more faulty and that if Mr. Kellar was the discoverer of how to so mix a filler of cement as to make it cement to pieces of iron or a piece of iron and a piece of concrete together, he has utterly failed to disclose how to do it, and he has failed to claim his discovery of how to do it.

The Worley patent disclosure differs from the Kellar solely in the formation of the gate or valve, and the Worley patent, as a franchise is directed to Mr. Wor-

ley's invention of a specific construction of gate valve. But he discloses the use of the cementitious filler for joining his gate valve to the end of the pipe by means of cementing it to the pipe.

Clearly these prior patents and publications show that the use of cement to join two metallic surfaces together, or to join a metallic surface and a concrete surface or object, was old and well known long prior to Mr. Kellar's alleged invention. Mr. Thomason, of the plaintiff company, says: "Many years prior to this invention I knew of clay water pipes filled with cement between the flange and the end of the other pipe." [Record page 39.]

The alleged inventor, Mr. Kellar [Record page 31], admits that he knew the value of cement as a means of holding the two parts together. Mr. Martin says that he has seen pipes that have been placed hundreds or thousands of years in fact with joints made with cement. He also positively states that cement itself is not new as a means for forming a closure between the bell and the spigot end of the pipe. [Record page 46.]

Mr. Martin says that the novelty of the patent in suit was the conception that cement would hold as a filler without additional means forming a mechanical holding device. [Record page 96.] This was not new. The patent to Hassell [Record page 113], the patent to Worley [Record page 137], the patent to Jackson [Record page 134], the patent to Wakefield [Record page 126], show examples of a cement filler alone re-

lied upon to make the joint and hold the two pieces in position with respect to each other.

The patent to Buttorff [Transcript pages 140-143] shows a headgate of the sliding type having the same species of flange and the same cement filler. This Buttorff patent as a franchise of monopoly is directed to improvements in the construction of the headgate itself and the invention is not directed towards means for fastening the headgate on the line. It is true Mr. Buttorff not only shows and describes the cement or concrete filler 27, but also bolts 24 extending between lugs 23 on the flange and lugs 25 on the pipe. It is obvious, however, that anyone having to disconnect a Buttorff headgate from a line would have it brought to his attention (a well known fact of common knowledge as proven by the other prior patents) that this cement filler would adhere to both these metal parts and must be chipped off in order to remove the gate. This Buttorff patent, taken in connection with the Worley patent, shows absolute want of invention, shows mere selection on the part of Mr. Kellar and proves conclusively that what Mr. Kellar did cannot rise to the dignity of "invention" as distinguished from mere mechanical skill and the use of the common knowledge of this art.

Clearly, the Kellar patent in suit cannot be sustained upon any theory of any difference between the cement filler referred to therein and the cement filler of the prior patents or of the "International Library of Technology" drawings and description. [Record pages 107-110.]

Particular attention is called to the fact that the Kellar patent does not in any manner describe or set forth the composition of this cementitious filler. It does not in any manner teach anyone how to compound or apply the same. On the contrary, the theory of the specification seems to be that *a* cementitious filler which will have the desired effect is old and well known in the art. If not, the patent is void for uncertainty, for the only references in the Kellar patent to this cementitious filler are in column 2, lines 66-72, and in the claim. All that is contained in the specification or description is that "with the pipe applied to the gate in this position I fill this annular space with a filler 16 of cement *or a similar composition* which is adapted to set and harden in place. After this cement 16 hardens the gate will be found to be securely fastened to the pipe, for the cement attaches itself to the outer surface of a pipe and the inner surface of the flange 15."

If the invention resided in any particular kind of a cement filler, "or a similar composition," it was the duty of the inventor, Mr. Kellar, under section 4888 of the Revised Statutes, to file in the patent office a "written description of the same and of the manner and process of making, constructing, compounding and using it, in such full, clear, concise and exact terms as to enable anyone skilled in the art or science to which it pertains, to make, construct, compound and use the same." If it resided in anything specific or particular, either in manner of mixing the filler or in the ingredients of the filler, it was necessary for these

to be pointed out and made a part of the "claim" of the patent under section 4888 of the Revised Statutes. Failing in this, the patent was void.

In re Incandescent Lamp Patent, 159 U. S. 465, 474;

Howard v. Detroit Stove Works, 150 U. S. 164;

Wood v. Underhill, 5 How. 1;

Tyler v. Boston, 7 Wall. 327;

Mitchell v. Tilghman, 19 Wall. 287;

Chemical Rubber Co. v. Raymond Rubber Co. (C. C.), 68 Fed. 570;

Badische Anilin & Soda Fabrik v. Kalle (C. C.), 94 Fed. 163;

Matheson v. Campbell, 78 Fed. 914;

Panzl v. Battle Island Paper Co., 138 Fed. 48.

The patent in suit is void for want of invention, for anticipation, and for indefiniteness and uncertainty both of specification and claims and the decree should, therefore, be reversed.

FREDERICK S. LYON,
Solicitor for Appellants.

No. 2893.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FRANK P. SNOW, et al.,
Appellants,
vs.
KELLAR-THOMASON COMPANY,
Appellee.

APPELLEE'S BRIEF

CHARLES C. MONTGOMERY
908 Security Building,
Los Angeles, Cal.
Solicitor for Appellee.

Filed

FEB 7 - 1917

F. D. Monckton,
Clerk

No. 2893.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

FRANK P. SNOW, et al.,

Appellants,

vs.

KELLAR-THOMASON COMPANY,

Appellee.

APPELLEE'S BRIEF

Appellee takes the liberty of suggesting the following extracts from the reporter's notes of Judge Van Fleet's decision as containing as full and clear an exposition of complainant's case in the lower Court as can very well be put in words:

"The whole question here is one of novelty.
Does the device disclose invention? * * *

Now, the line, in any art, which divides invention from mere mechanical improvement is a

shadowy one and uncertain, and it is made more uncertain frequently because of the difference in the history of different arts. What would be invention in one art would not be invention in another, by reason of the history of the latter art. * * *

And I may say in passing, on the question of the suggested simplicity of the change that has been produced here, that that is no indictment against invention. It has been held and reiterated that simplicity in itself is rather a virtue than otherwise. A thing does not have to be complicated in order to give one the benefit of a change as involving invention. It may be apparently the simplest thing in the world. * *

Now, here we have an art involved in this case which has not much history behind it; that is, I mean the particular field of the art we are dealing with. It has only had a history of a few years, and that a local one. And yet we find that in the progress of that art, although in its youth, there has been disclosed an effort from the very first to accomplish by some simple and efficient means what the plaintiff's device here admittedly does. We find that all sorts of means and methods have been resorted to to secure in a safe and efficient way to the end of the pipe, where pressure is bound to come, valves and gates such as are involved here. It is true that we find in the art the use—and it is old, of course, very old—of cementitious filling for the

joints in laying pipe lines. But I think the history of the art disclosed quite distinctly that that element has not been used for the purpose which the plaintiff's device disclosed. It was used largely, if not entirely for another purpose. It was used to make perfect joints, water-tight joints,—coupled, of course necessarily, with the effect that would follow the use of most any sort of filling, of, to a certain extent, strengthening the joints, strengthening the line; but we cannot find an instance prior to this conception of the plaintiff where the element of the cementitious filling has been contemplated not only for the purpose of making a perfect joint but as the sole reliance for the resistance of pressure—and, as the evidence tends to show, a very high degree of pressure. * * *

Now, I think that the device in question involved inventive thought of a very distinct order, because we see the gropings in the art for means to accomplish the same end here sought—the use of the hook and the bolt and the clamped ring, all those different methods, although they were employing at the same time the use of cement, but for a different purpose. No thought occurred to them, apparently, that they could depend upon the use of cement alone to accomplish the object which they were seeking. It seems to me that there can be very little question that we must accord to it the dignity of invention. I have no doubt, as intimated, as to the sufficiency of the claim in the patent, and

as I have indicated, I think it involves invention, that it involves that which is new in the art—the last step, as it has been termed. That, of course, does not mean the last step that will occur in the art, but the last step that has been exhibited in the art in the direction in which the conception points. There being no question raised as to the infringing character of the defendant's device, the decree will have to go for the plaintiff, sustaining his patent and holding the defendants for infringement; and it may provide for hearing before a Master upon the subject of any damage that may have been suffered. The usual form of decree."

The printed transcript will be referred to as "Tr."

The claim of the patent involved is as follows:

"A gate having a plate with an opening through which water may flow, a pipe having its end abutting against said plate adjacent to said opening, said plate having an outwardly projecting flange encircling the end of said pipe and forming an annular space between the end of said pipe and said flange, and a cementitious filler in said annular space securing said plate to said pipe. (Tr. p. 102, lines 77 to 85)"

Appellants' statement contained in the middle of page 4 of his brief to the effect that the invention is not to provide a novel construction, is really not literally a fair statement. It is true that plaintiff's

invention comprised a novel means for attaching a gate and valve, but according to the apparent meaning of complainant's patent it will be observed that part of the means does in fact consist of a flange which, in itself, is part of the gate or valve. As stated by witnesses, it is immaterial whether this flange is cast integral with a valve or gate, or is cast separately and afterwards made a part of a valve or gate by being bolted, rivetted or otherwise attached to the gate. When so attached it becomes part of the gate or valve and as such part it is distinctly new. (Tr. pp. 60-62.)

The extracts from the testimony of the witness Martin quoted in the paragraph succeeding the paragraph referred to as occurring on page 4 of appellants' brief, would be fairer if more of the answer of the witness had been quoted. The witness said:

“Yes, but all of these patents—for instance, in the Crane, they are good examples, and in the City Water Department, and so forth, are what we describe in the art and in commerce as a gate valve; that is a by-pass valve, a valve in a continuous line, a bell end on both ends. In our patents, there must be several elements which are absent in those devices because we have a flange and opening, a pipe, cementitious filler, and a means for cutting off a water flow, and the cementitious filler comprising the means to hold the gate on, which is not the case with a

gate valve, because it remains in place in any event.” (Tr. pp. 95, 96.)

Appellants’ counsel is not quite correct in stating as he does in the last paragraph on page 5 of his brief, that there is no novelty in the flange. The testimony of witness Thomason referred to if fully examined will develop clearly the fact that the flange was similiar in function to the flange of the original bell and spigot joint on the pipe, but there was a difference between the use of the flange to connect joints of pipe and the flange to attach a gate or valve to a pipe line. That the difference lay in this “that it was used to cement—to secure a valve TO THE END OF A PIPE.” (Tr. p. 42.)

It will be observed throughout the testimony from all the witnesses and from an examination of the exhibits this difference between securing a valve or connection in a continuous line where it would be subjected merely to a disposition of the water to leak and at the end of a line where the disposition is not only leakage but also and more important where it would be subjected to the tendency of the pressure of the water to force the valve or gate off the end of the pipe.

Appellants’ own expert, engineer Buckley speaking of the Hassell patent, one of their citations said:

“I don’t think I would say that this joint, as

shown here, could be compared to the gate as disclosed in the plaintiff's patent, this being purely a joint in a pipe line." (Tr. p. 68.)

Mr. Kellar stated:

"The flange employed by plaintiff is different from other bell flanges in use to secure articles to pipes. It is merely a straight flange without any grooves or lugs, or anything to assist the cement to hold other than its consistency. (Tr. p. 34.)

No point was made either in the patent or in the testimony of the witnesses during the trial on the question of what mixture of cement was requisite or desirable or necessary for attaching the valve or gate to the end of the pipe. The importance of any particular mixture has apparently impressed appellants' solicitor with more vigor than it has impressed either the inventor, the patent office examiners or any of complainant's witnesses who are familiar with the use of these valves.

It might almost be suggested that the Court will take judicial notice of the law of cement reactions. Cement always mixes with water or mixes with water and sand. Almost any ratio will set into a hard similitude of rock in sufficient degree to comply with the term "cementitious filler." Any cement filler with any compound of cement and sand will

serve the purpose of fastening the valve to the pipe line. Needless to say, the thinner the mixture the less secure the valve will be. All that is required of the artisan is the exercise of some judgment in compounding his sand and his cement and his water. There is no evidence any where, and there could be no truthful testimony to the effect that any particular ratio of sand and cement is necessary to fulfill the requirements of a cementitious filler as far as this patent is concerned.

A patent is not subject to attack for uncertainty which leaves something to the skill of the persons applying the invention when sufficiently definite to guide those skilled in the art to its successful application.

Minerals Separation vs. Hyde, Ads. Ops. Oct. term 1916 p. 82, citing:

Mowry vs. Whitney, 14 Wall 620, 20 L. Ed. 860.

Ives vs. Hamilton, 92 U. S. 426, 23 L. Ed. 494.

Carnegie Steel Co. vs. Cambria Iron Company, 185 U. S. 403, 436, 437, 46 L. Ed. 968, 985, 986, 22 Sup. Ct. Rep. 698.

Appellants' contention that it was well known that a cementitious filler in connection with a flange would serve the purpose of complainant's device is very clearly negated by each and every one of ap-

pellants' references and exhibits in the case. The very first patent cited by appellants reads:

“This pipe-joint is very effective when the same is not exposed to much strain or pressure.”
(Tr. p. 113, lines 37-39.)

In the Galvin patent, both of the lower cuts show a flange for the insertion of a pipe and both of these flanges are grooved out to serve as a binding element. (Tr. p. 115.) And so on through each and all of the so called anticipatory exhibits.

It will be made apparent from even a cursory examination that all of the builders, patentors and artisans working the art conceived the idea prior to plaintiff's invention that a cementitious filler alone would not be sufficient to hold on a valve or gate against pressure. The inventor was the first to conceive that a cementitious filler between the pipe and the smooth flange would hold the valve and gate in place against pressure of several thousand pounds exerted against the full face of the valve, (not to the square inch.) (Tr. p. 47.)

As soon as plaintiff's invention was placed upon the market the device obtained a great popularity, came into common use and was imitated by defendant, who was an ex-employee of the plaintiff company who learned how to make this valve while in the employ of the plaintiff company and who in fact

sought to avoid infringement of it by changing the curve of his flange, that is by making his flange eleven sided instead of truly circular in form. (Tr. pp. 35, 36, 51.)

“The use of this invention grew pretty rapidly.” Half of plaintiff’s “business has been in this kind of a valve, or using this flange; perhaps \$50,000 worth a year.” (Mr. Thomason Tr. p 40.)

“Plaintiff employs about fifty men, has employed more when business was better. It has about an acre and a half in factory site. The manufacture of the device in question is one of their main lines. Their best year was estimated 1913 when ten or fifteen thousand of them were put out representing something like \$40,000 to \$50,000.” (Mr. Keller Tr. p. 33.)

Appellants’ solicitor inquires how the user of the Hassell and other patents on joints in pipe-lines could have failed to discover the binding qualities of cement. A reason is suggested in one of appellant’s own citations, “because laborers seldom pack the joint full” (Tr. p. 107) and there is “liability that the cement may work up into the inside of the pipe and form miniature dams against the flow” (Tr. p. 108.) The skin friction of the earth itself is sufficient to hold the pipe in place. (Tr. p. 43.)

The very fact that in all the prior devices there were other means besides the cementitious filler to

serve as an attaching means in a continuous pipe line turned away the mind of an ordinary man from the thought of using cement and a straight flange in looking for a means of attachment to the end of a pipe line. Not only would the thought not occur to a man skilled in the art but when the idea was presented to such an one he did not think it would hold.

The following is quoted from the cross-examination of defendants' witness, John Mitten, a mechanic 36 years of age who has been working for the City Water Department of Los Angeles for 10 years as a caulker, a pipe man, one having mechanical skill and the use of the common knowledge of this art:

(Tr. p. 92.) "Q. Did you ever put a valve with a flange shape like that on the end of a pipe? (Indicating device.)

A. How do you mean? This would be on the valve, do you mean?

Q. Yes, put your pipe on the inside here, have a flange in this shape.

A. No, I never did.

Q. Would you think that would hold if it were placed on the end of a pipe and filled in with cement here a half an inch thick?

Q. BY THE COURT: Do you think it would hold under pressure?

A. Well, your Honor, it would depend how much pressure would be on that pipe. There is an awful short space there for material to hold

there. Even lead I would not gamble on it holding five minutes on a joint like that.

Q. You would be afraid it would blow off?

A. I would be afraid it would blow off: that is, there is not stock enough there—

Q. I understand what you mean, there is not enough hold.

A. The majority of our bells are four inches or four and a half; that would give us four and one-half inches of cement or lead; and we can gamble on our joints; they hold pretty good.

RE-DIRECT EXAMINATION

By MR. SEVERANCE: Q. The strength of such a joint would depend upon the size of the valve and the amount of cement?

A. The amount of cement you could get in there—

Q. Beg pardon.

A. I wouldn't gamble on a joint like that. I wouldn't recommend it at all. There is not enough stock to hold it to my idea."

Plaintiff's device is not a thing which would occur to one as skilled in the art as a means to accomplish the object desired.

Mr. Thomason testified:

(Tr. p. 38.) "When we first devised this plan of securing a valve to the end of a pipe, we of-

ferred it for sale to a man engaged in pipe making. He said, 'That won't stay on'; it would be blown off by pressure; he said, 'That cement will not adhere to it, that infinitesimal amount of shrinkage will not let it go on.' I suggested it to one of the best cement men here in Los Angeles; he is here now; you would know him. He said, 'You can't secure it in that way.' I said 'I want to demonstrate that to you.' I did. And he was surprised to find an iron valve could be secured to the end of a cement pipe without any anchors or bolts or clamps, or anything of that sort. We found that none of the men engaged in the use of cement—engaged in the manufacture of pipe that believed this could be done; I have had numbers of them tell me it couldn't be done; the discovery was made rather accidentally."

Arthur S. Bent testified:

(Tr. p. 64.) "I am 53 years old; I live in Los Angeles; am a contractor in concrete construction and specialize somewhat in concrete pipe lines. I do not know as I am an expert. I have done a good deal of that sort of work. I am familiar with cement; and pipe connections—the pipe consisting of cement and the device being of metal construction, have been engaged in that line of construction twenty-five years. My recollection is that my impression at the time I first knew of plaintiff's device No. 2, it would not succeed because I thought it would blow off under

any considerable pressure. That was before I had seen it tested. My recollection of the prior devices without remembering them in detail is they were all of a sort which had the flange which could be cemented over so that the moulder made a bond over the iron. The moulder would have to be sheared to separate them, or else to have ears and lugs or devices of that sort which could be physically joined to the pipe, requiring something more than a straight lift to separate them.

Until I saw plaintiff's device, I don't remember any device where they depended upon a cementitious filler between a straight flange encircling the end of the pipe and the pipe.

CROSS-EXAMINATION

The reason I supposed the cement was not used (Tr. p. 65) in connection with the iron, was a general doubt as to its success. We always placed our ordinary slide gates with the water pressure against the gate, but since then I have often stuck a gate right on with the water pressure behind it and had it hold. Previous to some such experience as this, I would not have expected it to stay.

I don't think I ever had seen a cementitious filler used where it was required to obtain a hold upon the iron to hold it on the pipe up to the time I first saw something of this sort. I don't know whose this is, but a cap of this sort was the

first time I had seen it done. I thought that a device of this sort would blow off. The kind I was familiar with were fastened by other means, the ears and lugs—the devices that I was familiar with at that time had some protecting iron or an arrangement by which the moulder could come up over the iron so that the moulder itself would have to be sheared. It is hard for me to remember just what were in use at the time I first saw this. I remember this was new to me and I expressed some doubt as to whether it would succeed. We have used valves of various sorts for many years, the moulder fastening onto the iron in different ways, but I don't recollect anywhere there was nothing to prevent a straight lift, except the bond between the cement moulder and the iron, I don't remember any."

The fact that in the prior art so many had used other means to bind the gateplate to the pipe and to secure the joints of pipes would *mislead* the ordinary mind, would lead one away from depending on cement alone in such a combination as in plaintiff's invention. This is a consideration given weight by the courts in determining novelty.

Hartford vs. Moore, 181 Fed. 134, 135.

Potts vs. Cregor, 155 U. S. 606, 39 L. Ed. 279.

Hobbs vs. Beach, 180 U. S. 388, 45 L. Ed. 591.

In an improvement patent such as this, the ad-

vantage may reside in the ease or cheapness of manufacture.

30 Cyc. 826.

A very important element and one which makes the patent commercially valuable is the “outwardly projecting flange encircling the end of said pipe and forming an annular space between the end of said pipe and said flange.” (Tr. p. 102, lines 80-83.)

Mr. Thomason says that there was no bead on the outer flange, none on this at all.

“This really—this has a little bit of flare to it. The flare is merely to enable the moulder in the foundry to draw it out of the sand. The flare on the outer flange has this effect on the ease and cheapness of manufacture, we don’t have to use any core, only just the green sand proposition.” (Tr. p. 43.)

This form of construction of the flange without grooves, beads or projections of any kind to hinder its being drawn out of the sand obviating the necessity of the use of any core, is the same in defendants’ commercial device.

Defendants’ counsel cites on page 11 of his opening brief the patents to Hassell, Worley, Jackson, and Wakefield as showing “examples of a cement filler alone relied upon to make a joint and hold the two pieces in position with respect to each other.”

That is not true. Cement alone is not relied upon in any of these patents. There were always other means.

Defendants' expert Mr. Buckley testifies:

HASSELL PATENT NO. 318,616:

(Tr. p. 68.) "There is disclosed here what is plainly a bell and spigot connection with some novelty of filling, that is the only thing I see in this. * * *

I don't think I would say that this joint, as shown here, could be compared to the gate as disclosed in the plaintiff's patent, this being purely a joint in a pipe line."

ON CROSS-EXAMINATION

(Tr. p. 81.) "Q. You stated on your direct examination that the elements of the Hassall claim, Exhibit "B", were a flange face and a filler. What other elements do you find beside the above in the patent?

A. I find two concentric rings described in the specification * * *."

(Tr. p. 82.) In the specification as to whether the pipe joint is adapted to withstand pressure: it is stated, "This pipe joint is very effective when not exposed to too much strain or pressure."

(Tr. p. 83.) Exhibit I, the WORLEY patent, on Line 16 refers to the water flowing into the

pipes, and Line 34 shows that the device is to be placed on the inside wall of a ditch, and Line 75 reads, “* * * so as to prevent water from flowing into the collar from the ditch or other source of supply.” It seems very plain that the device is intended to receive water from the irrigating ditch.

Q. BY THE COURT: Well, it says, “this luting may also embed the posts 11 and 12 thus permanently securing the collar in the end of the concrete pipe.” (Tr. p. 84.) What is meant by the term “luting?”

MR. MONTGOMERY: Luting is an adhesive substance.

A. Claim 3. These wire members are described as being bent to form clamping limbs, and the luting is described as embedding a portion of said wire members to retain the collar in place.

This patent in general is somewhat similar in its method of permanently securing the collar to the end of the concrete pipe, to the method as employed by Mr. Kellar that was described yesterday, where a collar with a bead around the bottom was placed on the inside of a pipe.”

The witness here refers to a first device of plaintiff that was not successful. (Tr. p. 55.)

(Tr. p. 83.) In exhibit H, the JACKSON patent, the purpose of the lugs in this device is primarily to center the spigot end in the bell.

In 63, it says, “The lugs C also are provided

with a pocket F for retaining a packing of hemp G and for allowing the cement H to flow in around the spigot end of the pipe section to firmly hold the same in the socket.”

This patent is significant in connection with the patent in suit, to a limited extent only, showing the use of a cement filler in a bell and spigot joint.

(Tr. p. 82.) Exhibit F, the WAKEFIELD patent, I consider (Tr. p. 83.) only significant in connection with the patent in suit, in illustrating one form of bell and spigot joint. There is a mechanical lock indicated in this, independent of the filling material.”

(Tr. p. 74.) “THE WAKEFIELD patent has certain structural peculiarities. It appears that the bell end, as shown on this pipe, is provided with a broken annular groove in one side forming a lock for the spigot end—a mechanical lock.”

Reference is made in Appellants’ Opening Brief page 7 to the Seitz patent as showing anticipation.

In this appellants’ counsel does not seem to agree with appellants’ expert, Mr. Buckley, who said:

(Tr. p. 83.) “Exhibit ‘G’, the Seitz patent, according to the specification, the gate is not intended to retain water in the pipe it is intended to resist the entry of water into the pipe. The binding element consists of four bolts.”

(Tr. p. 76.) BY THE COURT: The specifica-

tions here call for for—cement or other suitable packing material. I would hardly say, from the specification and the claim here, that the so-called packing material was intended as a holding devise.

THE WITNESS: I think that inference is the one that I did, myself, make. It is to make, undoubtedly, a tight joint.

In fact, in 55 he has specified cement or other suitable packing material for the purpose of making a water tight joint; hence, he apparently relies on the bolts for strength.

(Tr. p. 72.) THE COURT: Yes, it would indicate that it must have been.

Q. BY MR. SEVERANCE: Would the cementitious filler and water tight connection have had any degree of holding effect upon the parts most in need?

A. It might easily be quite sufficient for the purpose, although not anticipated by the inventor.

As to the Buttorff patent referred to in appellants' Opening Brief page 12, defendants' expert Mr. Buckley testified:

(Tr. p. 84.) "Q. Exhibit 'J' I believe is the Buttorff patent. Is this gate designed to retain water in the pipe, or to receive it from a ditch or canal?

A. I think it would perform either function.

Q. What was it designed for? What was the patent claimed for?

A. I find in 15, 'My invention relates, generally speaking, to improvements in flood gates, adapted to control the flow of water from an irrigating ditch or canal to a lateral or branch ditch which supplies the consumer with a predetermined quantity of water.'

THE COURT: This really is in the nature of a measuring gate.

A. That is practically what it is."

Previously he had testified as follows:

(Tr. p. 73.) "There is an additional element in the Buttorff patent in the bolts which connect the plate, having a rearwardly projecting flange to the pipe. These bolts extend from inwardly projecting lugs in the annular space between the pipe and the interior of the flange, and other lugs attached to the pipe itself.

Q. (By the COURT.) They perform apparently a similiar function to that found in the Seitz patent?

A. I don't think so, your Honor, because the structure of this plate and the attached or integral flange, together with the character of pipe that is shown, would in itself be such that if the annular space were filled with cement it would be impossible to remove the gate from the end of such a pipe. My impression would be merely to hold the gate in place while the ce-

ment was being put in place, my impression being based on the obvious fact that such a cement filling would provide a connection of very great strength.

By the COURT: I couldn't concur in that construction; there is too much strength in that construction-apparent strength for a mere temporary purpose such as would be subserved by holding it in place. I would be inclined to say they were intended for strength in the annular filling there for a tight joint.

A. It may have been the inventor's intention, Your Honor."

(Tr. p. 78.) "By the COURT: The witness gave it as his judgment yesterday, in referring to this particular device, that that bolt connection was made for temporary stay while the cement was setting.

MR. SEVERANCE: Yes that was suggested.

The COURT: In that I couldn't agree with him.

MR. SEVERANCE: You couldn't? Well, possibly not—

The COURT: Because I do not think that the general structure, and for the very reasons that have been suggested by the witness himself, that would call for any necessity for a temporary stay; I think they were intended for additional strength.

The WITNESS: They may have been so in-

tended by the inventor. I merely expressed the opinion, however, that they were wholly unnecessary in view of the excessive strength of such a joint."

Appellants' counsel suggests that any one having to disconnect the Buttorff headgate from a line would have it brought to his attention that the cement filler would adhere to both these metal parts and must be chipped off in order to remove the gate. That is not probable because of the peculiar construction of the Buttorff flange forming, as the defendants' expert says, a mechanical lock. To break cement locked behind a slanting flange would not suggest that there would be sufficient strength in the cement alone to hold a straight flange against water pressure.

There is considerable testimony in the transcript as to plaintiff's unsuccessful efforts to accomplish the result which has been accomplished by the device covered by the patent in suit, (Mr. Thomason, Tr. p. 40, Mr. Martin, Tr. pp. 55, 56) and as to the study and experimenting done by the inventor and his associate before as he says he developed something he "felt like was worth patenting, and made application and secured one patent as referred to here, the one we have before us. * * * and all these years I have been studying and experimenting in different ways along that line." (Tr. p. 30.)

In Gandy vs. Main Belting Co., 143 U. S. 586, 36 Law. Ed. 276 the court says:

“In view of the fact that previous attempts, of which there appear to have been several, to make a practical canvas belt had been failures, and that Gandy had been experimenting with the subject for several years before he discovered that a change was necessary in the structure of the canvas itself, we do not think his improvement is a change in degree only, or such an one as would have occurred to an ordinary mechanic, and our opinion is that it does involve an exercise of the inventive faculty. The change is such as would only have occurred to one familiar, not alone with the impossibility of making a practical belt out of the ordinary canvas, but to one who had bestowed considerable thought upon the method of overcoming the difficulty.”

There was a demand for some contrivance which, without clamps, bands, collars, anchor bolts, eye-bolts, lag bolts, plain bolts, nuts, screws, lugs, ears, beads, grooves or other means, without reducing the size of the pipe, would attach an irrigating valve or gate to the end of a stand-pipe in the field and thus control the flow of water in irrigation and as a hydrant.

Mr. Keller says there was a demand for something to secure these gates to the end of the pipe. Many

times the latter ended at a street, and it was desired—or at a arroyo, or ravine or something like that where they wanted to drain out the pipe. (Tr. p. 31.)

Mr. Thomason stated:

(Tr. p. 40.) “There was a demand for such a thing. It was necessary to have some means of closing the pipe end of a stand-pipe in a field to shut the water off, and then it could be used to open it to let it flow again, and we used the other kinds of valves I have just described, but it gave a great deal of trouble, in being forced off by water pressure, in being on end in that manner, so there was a good deal of demand.”

Mr. Martin stated:

(Tr. p. 52.) “It should be understood that when farmers and ranchers commence to irrigate by underground (Tr. p. 53) pipe systems, there grew a need for some devices which had never before existed in any art. Hydrants and water distributing means were quite old, but were expensive. For instance, this valve, which weights, say 22 pounds now sells for about \$5. That, to the consumer the requirement was for a cheap appliance, easy to attach, which did not require a plumber nor an expert to fasten onto a system, and which at the same time would enable the rancher to control the flow of water.”

Supplying a long felt want tends to establish the invention as novel. 30 Cyc. 862.

The testimony of Messrs, Thomason, Martin and Bent, men whose business and experience were adapted to bring to them a knowledge of all improvements therein, that no such improvement as covered by the patent had come to their knowledge is evidence of its novelty. 30 Cyc. 843.

Mr. Thomason testified:

(Tr. p. 40.) "Prior to this invention there was nothing so far as anything previously used was concerned, that suggested to me as a practical manufacturer that this flange could be put on the outside, encircling the end of the pipe, with an annular space between, and held there by a cementitious filler. We had never seen anything like this up to the time we used it."

Mr. Bent testified:

(Tr. p. 64.) "Until I saw plaintiff's device I don't remember any device where they depended upon a cementitious filler between a straight flange encircling the end of the pipe and the pipe."

Mr. Martin testified:

(Tr. p. 58.) "Q. BY THE COURT: I would like to ask the witness a question. I don't think you testified, you have stated your familiarity with the prior art for a considerable number of years,—what have you to say with reference to

the plaintiff's device as being the first application of the principle embodied there (Tr. p. 59) in the art of holding the valve or gate in the position that his patent calls for.

A. I have examined all of the patents in the Patent Office on this art of valves and gates, numbering something like six thousand. I think I have had and looked over every patent in any water distributing system, and as far as I know, this is the first, and until plaintiff's use, the only use that I have ever seen or ever heard of, either in the patented art or in the prior art, where a cementitious filler alone was depended on to hold a gate or valve on the end of a pipe under the water pressure, or in any other art."

ON CROSS EXAMINATION.

(Tr. p. 60.) "Where this flange and annular space and cementitious filler are used with a plate, they are absolutely new; where they are used in continuation of a pipe line, they are not new, because I have seen pipe lines in Pompeii that have been there thousands of years. That plate has a very important function, because that plate is what holds the head of the water. Where you have just the flange ring, or the flange and the spigot end in a continuous pipe line, you don't have any head of water against it. Where you have a plate you do have a head of water."

Mr. Buckley, defendants' expert, said on recross-examination:

(Tr. p. 88.) "I don't remember having seen a concrete pipe with a metal flange connected by means of a cementitious filler alone before the patent in suit."

In view of the new and additional use of an old element and the elimination in plaintiff's device of all other means of attachment except the straight flange and cementitious filler, and in view of the simplicity of the present device, its ease and economy of manufacture, its cheapness to the consumer, resulting from study and experiments, some of them unsuccessful, an improvement not known or conceived of by those who were likely to know, and filling a long felt want, we have here what the Court spoke of as a device involving "inventive thought of a very distinct order * * * the last step as it has been termed."

The decree should be affirmed.

Respectfully submitted,

CHARLES C. MONTGOMERY

Solicitor for Appellee.



